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No. 89-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DENNIS GWIRTZ, *et al.*,

Petitioners,

v.

OHIO EDUCATION ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 21, 1990

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QUESTIONS PRESENTED

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986), this Court held that unions seeking to collect agency fees are required to establish pre-collection procedures to safeguard the right of nonunion employees to refrain from supporting the political, ideological and other noncollective bargaining causes of the union, because "the agency shop itself impinges upon the nonunion employees' First Amendment interests." Among those procedures, unions are required to provide employees with an "adequate explanation of the basis for the fee" that includes "verification by an independent auditor." *Id.* at 306-07 & n.18.

The questions presented by this case are:

1. What did this Court mean when it held, in *Hudson*, 475 U.S. at 307 n.18, that unions must have their disclosure of the basis of the agency fee calculation subjected to "verification by an independent auditor"?

2. Is the First Amendment violated when a union engages an auditor to provide only a low level of auditing service to "verify" its agency fee calculations, where the lower courts found that use of readily available higher-level auditing services would provide better financial disclosure, and more assurance to nonunion employees that the union's calculations do not include charges for political and other noncollective bargaining purposes?

LIST OF PARTIES TO THE PROCEEDINGS

The plaintiffs in this case were Dennis Gwirtz, Doris Williams, Sarah Korns, James Chinni, Alan Siggelkow and Donald Sowash. All of these plaintiffs join in the instant Petition.

The defendant-respondent is the Ohio Education Association.

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IN THE

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OCTOBER TERM, 1989

DENNIS GWIRTZ, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Dennis Gwirtz, Doris Williams, Sarah Korns, James Chinni, Alan Siggelkow and Donald Sowash respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 887 F.2d 678 (6th Cir. 1989), and is reproduced *infra* at 1a as Appendix A. The order of the court of appeals denying a timely Petition for Rehearing and a Suggestion for Rehearing En Banc is reproduced *infra* at 11a as Appendix B. The opinion of the district court is reported at 704 F. Supp. 1481 (N.D. Ohio 1988), and is reproduced *infra* at 13a as Appendix C.

JURISDICTION

The opinion and judgment of the court of appeals were entered on October 11, 1989. The court of appeals denied a timely Petition for Rehearing and a Suggestion for Rehearing En Banc on November 28, 1989. Pursuant to Rule 13.4, Rules of the United States Supreme Court, this Petition is filed within ninety (90) days of the court of appeals' denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution says in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the Fourteenth Amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983, states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Ohio statute which permits the negotiation of agreements requiring nonunion public employees to pay a compulsory fee to a union, Ohio Revised Code § 4117.09(C), is reproduced in relevant part *infra* at 23a as Appendix D.

STATEMENT OF THE CASE

1) *Introduction.* This civil rights class action, brought under 42 U.S.C. § 1983, was initiated by six nonunion public school teachers ("teachers") in the United States District Court for the Northern District of Ohio, on December 30, 1987.[1] The teachers, on behalf of a class of similarly situated nonunion teachers in the State of Ohio, alleged that their exclusive bargaining representatives, the Ohio Education Association ("OEA" or "union") and its various affiliates, were collecting agency fees in violation of the principles enunciated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).[2] Specifically, the teachers

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[1]Jurisdiction in the district court was based upon 28 U.S.C. § 1331 and 28 U.S.C. § 1343. *See* Complaint, ¶ 9.

[2]Respondent OEA is just one part of a four-level *unified* nationwide union hierarchy. At the top of the hierarchy is the National Education Association ("NEA"), a nationwide labor union. Below the NEA is the OEA, its statewide affiliate. Below the OEA are "district education associations," such as the North East Ohio Teachers Association ("NEOTA"), and on the bottom are "local education associations," such as the Shelby and Brunswick Education Associations. The "local education associations" are actually the exclusive bargaining representatives of the [note cont'd on p. 4]

alleged that OEA's calculations of the chargeable vs. nonchargeable portions of the 1987-88 agency fee had not been subjected to "verification by an independent auditor," as required in *Hudson*, 475 U.S. at 307 n.18.

2) *Facts and Proceedings Below.* On or about December 15, 1987, OEA disseminated to all nonunion employees a "financial disclosure" package, as a prelude to the collection of agency fees for the 1987-88 school year.[3]

This package included:

a) the OEA's 1987-88 "basic financial statements," and a "*Supplemental Schedule* of Agency Fee Chargeable, Non-chargeable, and Reasonably in Dispute Expenditures," with an "opinion letter" from the accounting firm of Deloitte, Haskins & Sells (*see* Appendix E, *infra* at 24a *et seq.*); and

b) the NEA's Financial Statements and *Supplemental Schedules* as of August 31, 1987, and Report Thereon, including an "opinion letter" by another accounting firm, Coopers & Lybrand.

Although other documents were included in the OEA's "disclosure" package, *only* these two purported to be

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teachers. However, these "local education associations" rely upon their principal, OEA, to maintain a plan which purports to protect nonunion employees' rights to refrain from supporting political and noncollective bargaining causes. OEA thus established the rebate plan and disseminated the "financial disclosure" which are the subjects of this litigation.

[3]OEA, a politically active statewide union, had unilaterally determined that 97.6% of its voluntary members' dues was properly chargeable to nonunion employees, 2.4% was nonchargeable, and 0.0% was reasonably in dispute. (*See* Appendix E, which contains the Deloitte, Haskins & Sells' "opinion letter" and the OEA's agency fee "supplemental schedule" for the 1987-88 academic year.)

"audited" in any way, and are thus the only two relevant to the issue of what constitutes "verification by an independent auditor."

On April 29, 1988, the district court held an evidentiary hearing to determine whether the audit of the union's "basic financial statements," and the attached agency fee "supplemental schedules," complied with *Hudson*'s disclosure requirements. The district court was presented with extensive expert testimony concerning:

- the various types of auditing and non-auditing services that can be performed by certified public accountants;

- the manner in which the client alone can structure and limit the accountant's engagement; and

- the actual procedures (or lack thereof) performed on the agency fee "supplemental schedule" reports in this case.[4]

Summary of the Expert Testimony. The contract between a certified public accountant and his client (in this case, OEA) is called an "engagement." The client alone has the power to structure the engagement, which determines what audit or non-audit services the accountant provides. As with every other audit client, OEA had several options to choose from regarding the structure and detail of the work to be conducted upon its agency fee chargeability vs.

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[4]Testifying for the teachers was David Hawkins, Professor of Accounting in the Harvard University Graduate School of Business Administration. Prof. Hawkins specializes, and teaches courses, in the analysis of financial statements. Testifying for OEA was Robert Birzer, the partner in charge of the OEA's account with Deloitte, Haskins & Sells, and Arthur Mann, the partner in charge of the NEA's account with Coopers & Lybrand. Transcript citations ("TR") refer to the April 29, 1988, evidentiary hearing.

nonchargeability assertions.[5] (David Hawkins at TR 35-37; Robert Birzer at TR 115-18.)

OEA's "financial disclosure" to agency fee payors consisted of the union's "*basic financial statements*," audited by Deloitte, Haskins & Sells, with only an agency fee "supplemental schedule" attached. (*See* Appendix E.) The union's "basic financial statements" are *devoid* of information concerning agency fee chargeability vs. non-chargeability calculations, and show only items such as total union revenues and expenses. (Robert Birzer at TR 168-69; Arthur Mann at TR 189.) These "basic financial statements" are used primarily for the union's own internal budgeting and resource allocation purposes. As a practical matter, they are irrelevant to agency fee payors who need information related to *the calculation of the breakdown of the union's expenses into chargeable vs. nonchargeable activities*. (David Hawkins at TR 33-34.) Nevertheless,

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[5]The lowest level of service that can be provided by an accountant related to a client's financial statements is a "compilation." A compilation presents, in the form of financial statements, information that is the representations of management, without the accountant undertaking to express any assurance on the statements. (David Hawkins at TR 55.)

The next level of service is a "review." This entails performing inquiry and analytical procedures to provide the accountant with a reasonable basis for expressing *limited* assurance that there are no material modifications that should be made to the statements in order for them to be in conformity with accepted accounting principles. (David Hawkins at TR 55-56; *William Iselin & Co. v. Landau*, 71 N.Y.2d 420, 522 N.E.2d 21 (1988).)

Finally, an "examination" is the highest level of service that can be provided by an accountant related to a client's financial statements. This type of engagement provides the user of the financial statement with the *highest* level of assurance that the information is not materially misstated. This type of engagement requires an examination of financial statements, or specified elements of financial statements, in accordance with generally accepted auditing standards.

it was only the "basic financial statements" that OEA had audited by Deloitte, Haskins & Sells.

OEA's agency fee "supplemental schedules," on the other hand, were not subjected to a separate and specific audit, even though they were the only documents in the "financial disclosure" package which even purported to deal with the calculation of the breakdown between chargeable vs. nonchargeable activities. (*See* Appendix E.) Rather, OEA chose to have its auditors perform only a lower-level "supplemental" engagement to "verify" the calculation of the agency fee.

As a direct result of OEA's choice, Deloitte, Haskins & Sells was required to focus its "audit" work almost exclusively on the "basic financial statements," which are *devoid* of agency fee chargeability information, rather than on the completely separate agency fee chargeability information in the supplemental schedule.[6] OEA's auditors admitted that their work on the agency fee "supplemental schedule" did *not* provide fee payors with as high a level of assurance as the separate audit of the union's "basic financial statements." (Robert Birzer at TR 168; *id.* at 155 (the level of work on the supplemental schedule standing alone was not equivalent to an audit, but rather fell between an audit and a lower-level "review").) They also admitted that no detailed audit testing was performed on the calculation of the chargeable vs. non-chargeable breakdown for eleven of the sixteen major

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[6]That OEA's auditors focused overwhelmingly on the "basic financial statements," as opposed to the agency fee "supplemental schedule," is shown by the following: out of 450 man-hours spent on overall OEA engagement, only 29 were spent specifically on the agency fee supplemental schedule. (Robert Birzer at TR 118-19.) Similarly, in Deloitte, Haskins & Sells' "Audit Planning Memo" (the blueprint for the conduct of the entire engagement), the entire agency fee issue was described as "immaterial" in relation to the "basic financial statements."

expenditure categories contained in OEA's "supplemental schedule." (Robert Birzer at TR 123-40; *see* Appendix E at 36a.)

The agency fee payors thus received only limited independent pre-collection assurance that the agency fee calculations were accurate, to wit: Deloitte, Haskins & Sells opined only that the fee calculations were "fair[ ] . . . in relation to the basic financial statements taken as a whole." *No* assurance was given to the fee payors that the calculations were fair *in and of themselves*, as only a careful reading of the opinion letter makes clear.

> Our examinations were made *[only] for the purpose of forming an opinion on the basic financial statements taken as a whole.* The supplemental schedule of agency fee chargeable, non-chargeable, and reasonably in dispute expenditures for the year ended August 31, 1987 is presented for purposes of additional analysis and *is not a required part of the basic financial statements.* Such supplemental schedule has been subjected to [only] the auditing procedures applied *in the examination of the basic financial statements* and, in our opinion, is fairly stated in all material respects *[only] when considered in relation to the basic financial statements taken as a whole.*

(Appendix E at 24a-25a (emphasis added).)

Although Deloitte, Haskins & Sells specifically told OEA that it could be engaged to perform a higher-level audit focused on its agency fee chargeability vs. nonchargeability calculations, as it had done on the union's basic financial statements, the union refused. (Robert Birzer at TR 116.) Had OEA authorized that higher-level engagement, however, the auditors would have been required to focus exclusively on the agency fee issues and perform more detailed audit testing on the chargeability vs. nonchargeability breakdown for each of the sixteen major categories of expenditures. (*See* David Hawkins at TR 53;

Robert Birzer at TR 116 & 168, admitting that a higher-level engagement "could have resulted in an additional lot of testing . . .," and thus a "higher level of assurance" to the agency fee payors.)

Findings of the Courts. The district court found that OEA and its affiliates could have engaged their auditors to prepare higher-level "special reports" concerning the agency fee calculations, instead of the "supplemental schedules" that were disclosed to nonmembers. (Appendix C at 15a-17a.) It did *not* find that preparation of "special reports" would increase the unions' burden. The court also found that it "is basically undisputed that the level of assurance [provided to nonmembers], and the level of detail is greater" on a "special report" than on a "supplemental schedule." (Appendix C at 14a.) Despite those findings, the district court held that the union's 1987-88 agency fee "supplemental schedules" were subjected to adequate "verification" under *Hudson*, because it did not believe that *Hudson* requires "the least restrictive means available for the Union to disclose its finances." (Appendix C at 20a-21a.)

A panel of the Sixth Circuit affirmed. It admitted that a "special report" was an "available" service which would "give more detailed financial information" to nonmembers. However, it held that "the mere fact that a Special Report would provide 'better' or more detailed financial information does not make provision of a Special Report by the union constitutionally required." (Appendix A at 8a.) The panel specifically denied that an auditor should be engaged to audit (or in any way "verify") the union's *breakdown between chargeable vs. nonchargeable expenditures*, holding instead that "[i]t is not the role of an auditor to make such a legal determination." According to the panel, auditors can only "verify the expenditures made by the union so as to ensure that the expenditures that the union

claims it made for particular expenses were actually made for those expenses." (Appendix A at 7a n.3.)

The panel denied a timely filed Motion for Rehearing, and the Sixth Circuit denied a Petition for Rehearing En Banc. This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The lower court's refusal to apply the traditional "least restrictive means" test to this First Amendment case conflicts with numerous decisions of this Court, including *Hudson* itself.

The mere existence of an "agency shop" arrangement "is 'a significant impingement on First Amendment rights'" of nonunion employees. *Hudson*, 475 U.S. at 301 & n.8, 307 n.20 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). Therefore, "the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights" to refrain from supporting the union's political and other noncollective bargaining activities. *Id.* at 307 n.20; *see id.* at 302-03. One of the procedures that must be provided to minimize the impingement on employee rights, according to *Hudson*, 475 U.S. at 306-07 & n.18, 310, is financial disclosure to nonmembers that includes "a certified public accountant's verified breakdown of expenditures."

In virtually every context imaginable, this Court has recognized that infringements on First Amendment rights may be justified only "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive" of First Amendment freedoms. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *accord, e.g.,*

Elrod v. Burns, 427 U.S. 347, 363 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Boos v. Barry*, 485 U.S. 312, 321-22 (1988). In this case, however, the courts below refused to apply this traditional First Amendment test in determining what *Hudson*, 475 U.S. at 307 n.18, meant by the "verification by an independent auditor" that is necessary to protect the rights of nonunion agency fee payors.

This Court has never indicated that there is an "agency fee exception" to its traditional "least restrictive means" test. On the contrary, it has applied that test at least twice in the agency fee context.

First, in *Ellis*, 466 U.S. at 443-44, the Court implicitly applied that exacting standard to require unions to utilize "advance reduction" and "interest bearing escrow arrangements" to ensure that nonmembers' money is not committed to improper uses even temporarily. Where there are "readily available alternatives . . . that place only the slightest additional burden, if any, on the union," the Court held, those alternatives must be utilized.

Then, in *Hudson*, 475 U.S. at 303 & nn.11-12, the Court explicitly relied on *Roberts*, *Elrod*, *Kusper*, and *Button*, and several scholarly commentators' statements of the "least restrictive alternative" test, for the conclusion that "the First Amendment requires that the procedure [for determining agency fees] be carefully tailored to minimize the infringement" on nonmembers' constitutional rights. After *Hudson*, there is no principled basis for allowing a union to disclose financial information which provides less assurance than is readily possible that the calculation of the agency fee is fairly stated. In permitting a lower level of disclosure, the decisions below conflict with *Ellis* and *Hudson*.

There is not one iota of testimony in this record indicating that it would be burdensome, or even inconvenient, for OEA to engage its auditors to perform at the highest available level of audit service on the breakdown of agency fee chargeability vs. nonchargeability calculations. The union willingly engaged its auditors to perform at the highest level of service on its "basic financial statements," which are used for internal union budgeting purposes only. *See Hohe v. Casey*, 727 F. Supp. 163, ___, 1988-90 Pub. Bargaining Cas. (CCH) ¶ 35,446 at 39,392 (M.D. Pa. Dec. 11, 1989). Why then, when required to "facilitate *the nonmembers*' constitutional right to object," should the union be permitted to choose a lesser standard of auditing for them than it chose for itself? The short answer is that use of lesser standards for agency fee payors, where there clearly exist better and nonburdensome alternatives, is not consistent with protecting their First Amendment rights. *Ellis*, 466 U.S. at 444.

The panel justified its decision by arguing that the "least restrictive means" test does not require use of "the 'least restrictive' procedure *imaginable*." (Appendix A at 7a (emphasis added).) This argument misstates the teachers' actual position, and entirely ignores the expert auditing testimony in the district court supporting their position. The teachers did *not* ask for use of the least restrictive procedures "*imaginable*." Rather, they showed (via concrete and undisputed testimony) that there exist readily available auditing alternatives, the use of which are nonburdensome, that would more effectively protect the nonmembers' First Amendment rights and provide better information.[7]

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[7]The teachers do not ask for grossly restrictive or unrealistic verification. They agree fully with the position, recently adopted in *Hohe v. Casey*, 727 F. Supp. at ___, 1988-90 Pub. Bargaining Cas. at 39,393, that an adequate agency fee "verification" must be an: **[note cont'd on p. 13]**

The panel also excused OEA's failure to request the higher-level auditing engagement for agency fee payors by relying on this Court's statement that "absolute precision in the calculation of the charge" is not required, citing *Hudson*, 475 U.S. at 307 n.18. (Appendix A at 8a.) However, the effect of the panel's decision is that *NO* precision is required in the independent audit phase of the agency fee collection process, and none was provided to the teachers here. That the fee need not be calculated with "absolute precision" does not give unions *carte blanche* to calculate it *imprecisely* and give nonmembers imprecise and unreliable disclosure.

In any event, the record in this case is quite clear: the work performed on the "supplemental schedule" was the antithesis of precision on the *sole* issue of importance to agency fee payors, *the chargeable vs. nonchargeable calculation*. (Robert Birzer at TR 123-40, admitting that no detailed audit testing was performed upon the chargeability vs. nonchargeability nature of eleven of OEA's sixteen major expenditure categories; *id.* at TR 155, admitting that the work on the agency fee issue fell below the "audit" level, "between a review and an [audit].")[8]

The panel below chose to follow *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987) and *Ping v. NEA*, 870 F.2d 1369 (7th Cir. 1989), which held,

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> audit . . . conducted in accordance with generally accepted auditing standards sufficient for the auditor to be able to form an opinion that the [agency fee] financial information is fairly stated in all material respects. This does not require the auditor to go through every invoice, receipt or financial document but only to obtain sufficient evidential material upon which to form an opinion.

[8]See *William Iselin & Co. v. Landau*, 71 N.Y.2d 420, 522 N.E.2d 21 (1988) for an explanation of the great difference between a traditional "audit" and a lower-level accountant's "review."

without the benefit of any expert auditing testimony, that the role of the auditor was merely to "verify" that the union in fact expended the amounts claimed, rather than to verify the union's *calculation of the breakdown between chargeable vs. nonchargeable activities* for those amounts. The approach taken by the panel, and *Andrews* and *Ping*, conflicts with *Ellis* and *Hudson* for two major reasons, which we now detail.

1) These courts failed to recognize what auditors are permitted to do, and actually do, under Generally Accepted Auditing Standards. These courts held that auditors should be limited to "verifying" only the total amount of union expenditures, and *not* their allocation into chargeable vs. nonchargeable categories, because, they reasoned, auditors cannot "make the legal determination" of what is chargeable and what is not. *Andrews*, 827 F.2d at 340; *accord, Ping*, 870 F.2d at 1374; Appendix A at 7a n.3. But by so holding, all of these courts failed to recognize what auditors *actually* do.

The expert testimony in this case is quite clear concerning what auditors can properly do in the area of agency fee auditing: the union's own auditors *admitted* that they could have been engaged to audit, in full accord with Generally Accepted Auditing Standards, the breakdown of OEA's chargeable vs. nonchargeable calculations, if only the union had asked them to do so. (Robert Birzer at TR 116.) There is not even a hint in the record that this type of specific audit engagement of agency fee chargeability calculations, if requested, would have improperly required the auditors to cross over the line into making "legal determinations."[9] The plain and simple fact is that OEA

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[9]The record also includes audits, performed at the highest level of service, by Laventhol and Horwath, a national accounting firm, on other unions' chargeability vs. nonchargeability breakdowns. In one instance, a "qualified opinion" was issued **[note cont'd on p. 15]**

wilfully refrained from engaging its auditors to perform this higher-level service, even though they were advised of its availability. (Robert Birzer at TR 116-18.)

Thus, contrary to the speculative and uninformed analysis of *Andrews* and *Ping*, the record herein shows that auditors engaged specifically to audit a union's calculation of the breakdown of expenses into chargeable vs. nonchargeable categories do a traditional cost allocation audit, something they are uniquely trained to do (and do every day). The panel below, like *Andrews* and *Ping*, misconstrued what auditors actually do in their "usual" roles. *Compare Andrews*, 829 F. 2d at 340 (which held that auditors' "usual" role was limited to "ensur[ing] that the expenditures which the union claims it made for certain expenses were actually made for those expenses"), *with Hohe v. Casey*, 727 F. Supp. at ___, 1988-90 Pub. Bargaining Cas. at 39,391 (accepting *Andrews*' formulation of the "usual" role of the auditors, but only "in th[e] sense" that the usual role also included specific audits of the *breakdown between chargeable vs. nonchargeable activities*).

The teachers have *not* asked for the union's auditors to "make the determination" of what is chargeable and what is not. They agree that under *Hudson* (and Generally Accepted Auditing Standards), it is the union in the first instance (like every other audit client) which makes the allocations between chargeable and nonchargeable activities. Rather, the teachers contend that the auditor must be engaged, not to "make the determinations," but specifically to audit *the union's* calculations once they are made. This position is fully consistent with modern auditing practices, as the record below amply demon-

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because that union was unable to supply the auditors with sufficient competent evidential matter to support its agency fee assertion. (David Hawkins at TR 82-85; *see also Hohe*, 727 F. Supp. at ___ n.4, 1988-90 Pub. Bargaining Cas. at 39,393 n.4.)

strates. (Robert Birzer at TR 116-18; *see also Hohe v. Casey*.)

2) The panel below, and *Andrews* and *Ping*, also failed to recognize the negative consequences upon agency fee payors' rights where an auditor only "verifies" that one million dollars was expended for union officers' salaries, as opposed to the auditor "verifying" the union's *chargeability vs. nonchargeability allocations* of those salaries. An engagement to provide the former service provides *no* independent pre-collection assurance to the nonunion employee that the *chargeability vs. nonchargeability calculation* for the salaries is accurate, even though that calculation is the only matter of concern to agency fee payors. A limited engagement of this type entails little more than adding a few columns of numbers, a task more suited to a reasonably educated high school student than a multinational "Big Eight" accounting firm like Deloitte, Haskins & Sells. In contrast, a specific audit of the union's chargeable vs. nonchargeable breakdown furnishes significant assurance to the agency fee payor that the amount of his wages about to be seized was calculated in a reasonably accurate manner, as well as additional information on which to base a decision to challenge the amount or not.

The decisions of *Andrews*, *Ping* and the panel below thus undermine the entire due process basis for *Hudson*'s "independent verification" requirement: that nonmembers are entitled to some sort of independent, pre-collection check to insure that the union's reduced fee calculations were reasonably accurate, and not just self-servingly plucked out of the air. *Hudson*, 475 U.S. at 306-07; *Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987); *see also Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264-65 (1987), *citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (before even a *temporary* loss of property can be permitted, the deprived party must receive adequate pre-deprivation protections, even if he will ultimately

have a full post-deprivation evidentiary hearing). These due process "pre-deprivation assurance" factors are particularly important where, as here, not just "property," but *core* First Amendment rights are at stake. *Hudson*, 475 U.S. at 301-04 & n.13; *Ellis*, 466 U.S. at 445-48.

In short, the court below failed to ensure that the nonmembers received accurate and adequate disclosure to help them assert their "meritorious First Amendment claims." Its decision is completely inconsistent with the rationale underlying *Hudson*. This Court should grant certiorari to ensure proper adherence to its First Amendment precedents, including *Hudson* and *Ellis*.

II. The decisions of the lower courts are chaotic in interpreting what this Court meant when it required a union's agency fee calculations to be "verifi[ed] by an independent auditor." This case presents the Court with a complete record of expert auditing testimony to determine the type of audit engagement that unions must utilize to "facilitate a nonunion employee's ability to protect his right" to refrain from supporting a union's political and noncollective bargaining agenda.

Hudson used the phrase "verification by an independent auditor" interchangeably with the term "independent audit." *Compare Hudson*, 475 U.S. at 307 n.18 *with id.* at 310 & n.23. Despite the apparent clarity of meaning, since the decision in *Hudson* the lower courts have struggled with the question of which of the many audit and non-audit services performed by accountants constitutes "verification by an independent auditor."

The Sixth Circuit's own decisions are in conflict on this issue, although the panel below refused to acknowledge the conflict. *Compare Tierney v. City of Toledo*, 824 F.2d

1497, 1503-04 (6th Cir. 1987), *and Damiano v. Matish*, 830 F.2d at 1369-70, *with* Appendix A at 6a-9a.

In *Tierney*, 824 F.2d at 1502, the Sixth Circuit "carefully consider[ed] the commands of *Hudson* . . . and the reasoning behind them," and established "an itemization of the minimal constitutional requirements which must necessarily be incorporated in any agency shop plan . . . ." Among the "minimal constitutional requirements" that *Tierney* found necessary was the following:

> The independent auditor must *verify each major category* in the union's budget or expenses for *each major category* of expenses and indicate which categories comprise each component [chargeable, nonchargeable, or reasonably-in-dispute].

Id. at 1504 (emphasis added). Then, in *Damiano*, 830 F.2d at 1370 (emphasis added), the Sixth Circuit reiterated the view that the auditor must perform a specific audit of the union's calculation of the breakdown into chargeable vs. nonchargeable categories:

> *Hudson* also mandates the verification *of the union's [chargeable vs. nonchargeable] calculations* and disbursements from the fund by means of an independent auditor.

Thus, the Sixth Circuit twice interpreted *Hudson* to require that unions seeking to collect agency fees must engage their auditors to perform a traditional audit of "each" of the union's chargeable vs. nonchargeable calculations for "each" major category of union expenditure. *Tierney*, 824 F.2d at 1504; *Damiano*, 830 F.2d at 1369-70. The panel below later rejected this view, but without in any way analyzing or even mentioning the above-cited portions of the *Tierney* or *Damiano* decisions. *Cf. Hohe v. Casey*, 727 F. Supp. at ___, 1988-90 Pub. Bargaining Cas. at 39,392-93 (recognizing the conflicting approaches of *Andrews*, which the panel here followed, and *Tierney*).

The lower courts' divergence of approach on this issue is also demonstrated by comparing the decisions in this case with *Hohe v. Casey*. In *Hohe*, as here, the district court heard live expert accounting testimony. However, in contrast to the result here, it determined that the financial information disclosed to nonmembers did not satisfy the verification requirement enunciated in *Hudson*. Although the accounting disclosed in this case used a different format than that in *Hohe*, it is difficult to see how it would survive scrutiny under the reasoning in *Hohe*.

The court in *Hohe* first defined what *Hudson* meant by an auditor's "verification": the "verification must be what an accountant would do when undertaking an audit. The accountant must be able to opine that the information supplied is fairly stated in all material respects." In order to form such an opinion, the auditor must perform an "evaluation of the client's internal controls [and] an investigation" into whether the client's *chargeable vs. nonchargeable breakdowns* are supported by "'sufficient competent evidential matter.'" *Hohe*, 727 F. Supp. at ____, 1988-90 Pub. Bargaining Cas. at 39,391-92 (emphasis added).

Next, *Hohe* recognized that an audit of "basic financial statements," which do not concern chargeable vs. nonchargeable breakdowns, is irrelevant to agency fee payors and does not by itself comply with *Hudson*. Only a separate audit of the breakdown of expenditures into chargeable and nonchargeable categories suffices under *Hudson*:

> The [unions] further argue that the Supreme Court in *Hudson* meant verification to mean an examination of the basic financial statements under generally accepted auditing standards appropriate under the circumstances. . . . We disagree. . . . The whole point of providing the notice of nonmembers was to give them enough information to decide whether to challenge the fair share fee. That would require

> a breakdown between chargeable and non-chargeable costs. The Supreme Court has said that the necessary disclosure must include verification by an independent auditor. Hence, it must have meant verification of the breakdown. Verification of the basic financial statements occurs too early in the process to be of help. It would not provide any reassurance concerning the allocation of costs and enable a nonmember to decide whether to contest the fee or not.

Id. at ____, 1988-90 Pub. Bargaining Cas. at 39,392.

That is essentially the teachers' position in this case, a position that is wholly supported by the extensive accounting testimony in the record. Here, the unions' auditors did not opine that the "supplemental schedules" allocating costs as chargeable or not were "fairly stated in *all* material respects," but only as *qualified, i.e.*, "when considered in relation to the basic financial statements taken as a whole." (Appendix E at 24a-25a (emphasis added).) The consequent lack of meaningful testing of internal controls and supporting data as to the chargeable vs. nonchargeable breakdown of at least eleven of the sixteen expense categories in OEA's supplemental schedules was excused by the district court on the theory "that the schedule was derived from the detailed testing of the financial statements themselves." (Appendix C at 18a n.2.) However, because they contained no information as to chargeability allocations, the testing of the basic financial statements—no matter how detailed—here, as in *Hohe*, 727 F. Supp. at ____, 1988-90 Pub. Bargaining Cas. at 39,392 "would not provide any reassurance concerning the allocation of costs and enable a nonmember to decide whether to contest the fee or not."

In sum, it is difficult to reconcile the decisions of the lower federal courts, including apparently conflicting decisions of the Sixth Circuit itself, as to the nature of the independent verification required by *Hudson*. *See also Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1430, 1444 (1987), *reconsidered*, 704 F. Supp. 1456, 1460-63

(N.D. Ohio 1988) (vacating holding that the auditor must determine the breakdown of expenses as chargeable, nonchargeable, or reasonably disputable). This court should grant certiorari to end this confusion. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974) (certiorari granted where district courts had taken conflicting positions on an important issue).

III. This case is of nationwide importance.

The meaning of *Hudson*'s "verification by an independent auditor" requirement has been the subject of extensive litigation, voluminous expert testimony and conflicting decisions. Courts and administrative agencies throughout the nation are struggling with this issue. In addition to this case and *Hohe*, it is presently being litigated in *Tierney v. City of Toledo*, 123 F.R.D. 235 (N.D. Ohio 1988), *appeal docketed*, No. 88-4047 (6th Cir. Nov. 16, 1988); *Cramer v. Matish*, 705 F. Supp. 1234, 1237-38 (W.D. Mich. 1988), *appeals docketed*, Nos. 89-1885 & 2077 (6th Cir. July 18, 1989); *Werner v. Middle Country Teachers Association*, No. U-9680 (N.Y. Pub. Empl. Rel. Bd. filed Sept. 15, 1987); *Anselme v. Massachusetts Society of Professors*, Nos. ASF-2202 through 2223 (Mass. Lab. Rel. Comm'n filed Sept. 27, 1989). The unions which have agency shop clauses and the millions of employees who are subject to these clauses are entitled to a swift and uniform resolution of this issue. The instant case, with its complete record of expert auditing testimony, is ideal for that purpose. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236-37 (1977) (factually concrete record is necessary for the Court to decide constitutional issues).

CONCLUSION

This Court needs to clarify what is meant by "verification by an independent auditor." The panel below, by permitting unions to use low-level accounting services to "verify" their agency fee calculations, has failed to protect

the paramount First Amendment rights of nonunion agency fee payors to refrain from supporting the unions' political and ideological agenda by the least restrictive means. As it stands now, there exists little independent pre-collection check on the unions' otherwise unfettered ability to calculate and collect any arbitrary agency fee they choose. This cannot possibly be what this Court intended in *Hudson*. The petition for certiorari should be granted.

Respectfully submitted,

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February 21, 1990

APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

October 11, 1989

Dennis GWIRTZ; Sarah Korns; Alan Siggelkow; Donald Sowash; Doris Williams; James P. Chinni, On behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

OHIO EDUCATION ASSOCIATION,

Defendant-Appellee.

No. 88-4126.

United States Court of Appeals,
Sixth Circuit.
Argued Aug. 17, 1989.
Decided Oct. 11, 1989.

Before KEITH and MARTIN, Circuit Judges;
GIBBONS, District Judge.

BOYCE F. MARTIN, Jr., Circuit Judge.

Six nonunion public school teachers appeal the district court's judgment for the Ohio Education Association in this action brought pursuant to 42 U.S.C. § 1983. The plaintiff teachers claim that their first amendment rights were violated by the defendant union's collection of fair share fees under a public employment collective bargaining agreement. We hold that the union's procedure in collecting the fair share fees from the plaintiffs is not constitutionally infirm and accordingly affirm the decision of the district court.

I.

The plaintiffs, public school teachers in two districts in Ohio, declined to join the local education associations that are recognized as the exclusive bargaining representatives for all teachers in their respective districts. Under Ohio law, public employees within a bargaining unit who are not members of the unit's designated exclusive bargaining representative may be required to pay "fair share fees" to the exclusive representative and its affiliated organizations. Ohio Revised Code § 4117.09(C). Pursuant to this provision of Ohio law, the local education associations sought to collect fair share fees from nonmember employees, including the plaintiffs, during the 1987-88 year.

To collect fair share fees from nonmembers, the local associations followed a procedure adopted by the Ohio Education Association, the affiliated state union of the local associations, in which certain financial information would be disclosed to all the nonmember employees required to pay fair share fees. The information disclosed to the nonmember employees included: (1) the audited basic financial statement of the Ohio Education Association; (2) an audited "Supplemental Schedule" setting forth the expenditures by the Ohio Education Association that were chargeable to nonmember employees and those expenditures that were not chargeable to nonmembers;[1] (3) the 1987-88 budget of the Ohio Education Association; and (4) the audited financial

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[1]Fair share fees are "chargeable" to public employees who decline to become members of their designated exclusive bargaining representatives if the fees are expended by the union for activities germane to collective bargaining, contract administration or grievance adjustment. However, fair share fees are not chargeable to nonmember public employees if the fees are spent by the union for ideological or political activities. *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 261 (1977).

statement and "Supplemental Schedule" of the National Education Association, the affiliated national union of the local associations. The Supplemental Schedule of the Ohio Education Association provided to nonmember employees was issued pursuant to Statement Auditing Standard No. 29, which is one of the various standards issued by the Auditing Standards Board of the American Institute of Certified Public Accountants.

The plaintiffs filed suit against the Ohio Education Association on December 30, 1987, claiming that the association had violated their constitutional rights by failing to disclose adequate financial information prior to collecting fair share fees from them. More specifically, the plaintiffs alleged that the Association was constitutionally required to disclose its financial information with a "Special Report" issued pursuant to Statement on Auditing Standard No. 14, rather than with a Supplemental Schedule issued pursuant to Statement on Auditing Standard No. 29. On February 1, 1988, the plaintiffs also filed a motion for class certification, seeking to represent a class of all current and future nonmember employees who are required to pay fair share fees under their respective collective bargaining agreements.

The district court held a one-day evidentiary hearing on April 29, 1988, and issued its memorandum opinion granting judgment in favor of the Ohio Education Association on November 18, 1988, 704 F. Supp. 1481. In its opinion, the district court made specific findings of fact and conclusions of law which generally concluded that, although the level of detail and the monetary precision on an Auditing Standard No. 14 Special Report are greater than on an Auditing Standard No. 29 Supplemental Schedule, the type of financial disclosure provided by the Association was sufficient. More specifically, the court found that both a Supplemental Schedule and a Special Report are "proper reporting mechanism[s] for the special

subject matters such as the matter in this case" and that a Supplemental Schedule accompanying a basic financial statement is subjected to an independent audit because the basic financial statements, from which the Supplemental Schedule is derived, are subjected to detailed testing by auditors. Because the district court decided in favor of the Ohio Education Association, the court found it unnecessary to rule on the plaintiffs' motion for class certification. Plaintiffs filed a timely appeal to this court on December 6, 1988.

II.

On appeal, the plaintiffs argue that the Ohio Education Association is constitutionally required to provide them with financial information audited at the "highest" available level of auditing service. According to the plaintiffs, the "low level" of audit service that the Ohio Education Association's auditors have performed does not insure that the chargeability or nonchargeability of the Association's fair share fees is accurately determined. The plaintiffs assert that the standard is the highest available level of audit service. They argue that this is the only way they can determine if the share fees are used appropriately. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L.Ed.2d 232 (1986); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987).

We disagree with the plaintiffs' assertion that *Hudson*, *Damiano* and *Tierney* require a union such as the Ohio Education Association to engage its auditors to perform the "highest" possible level of audit service on financial information provided to payors of fair share fees who decline to join their designated exclusive bargaining representatives. Accordingly, we affirm the decision of the district court that the Association's disclosure of financial information to the plaintiffs is constitutionally sufficient.

In *Hudson*, the Supreme Court examined the procedures utilized by the Chicago Teachers Union to collect fair share fees from teachers who did not become members of the union. The Court held, in part, that the first amendment dictated that the nonmember teachers be given "sufficient information to gauge the propriety of the union's [fair share] fee." 475 U.S. at 306, 106 S. Ct. at 1076. The Court stated that the union must identify its expenditures for collective bargaining and contract administration for which the nonmember teachers could be charged a fair share fee, but noted that "absolute precision in the calculation of the [fair share fee] charge to nonmembers cannot be expected or required." Although a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," the Court declared that "adequate" financial disclosure by a union "surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n. 18, 106 S. Ct. 1076 n. 18.

In *Damiano* and *Tierney*, this circuit applied *Hudson* to cases involving nonunion member public employees who challenged the procedures followed by unions for collecting fair share fees from them. This court in *Tierney* found the procedure for the collection of fair share fees from nonmembers to be constitutionally infirm under *Hudson* because nonmembers were not, prior to the collection of fees from them, provided with detailed financial information concerning all major categories of union expenses that had been audited by an independent certified public accountant. 824 F.2d at 1506. Similarly, in *Damiano*, this court found the procedure implemented by a union to provide nonunion member employees with information regarding fair share fees to be constitutionally deficient under *Hudson* because (1) the information provided by the union failed to inform nonunion members of the actual amount of the fee or how the fee had been calculated; (2) the nonunion members had to specifically

request the information from the union; and (3) the nonunion employees were required to object to the union's expenditures of the fees before the union had even provided any information about the fees. 830 F.2d at 1370-71.

Applying *Hudson*, *Tierney* and *Damiano* to the present case, we conclude that the district court did not err in determining the Ohio Education Association's financial disclosure to nonunion member employees to be constitutionally adequate. The Association furnished the plaintiffs with the budgets, audited financial statements and audited Supplemental Schedules of the Ohio Education Association and the National Education Association. Following an evidentiary hearing at which the parties offered expert testimony, the district court specifically found that: (1) the Auditing Standard No. 29 Supplemental Schedule was a proper reporting mechanism for special subject matters such as the matter in this case, and (2) the Auditing Standard No. 29 Supplemental Schedule was subjected to an independent audit because the financial statements from which the Supplemental Schedule is derived were subjected to detailed testing. Given these findings by the district court, which we must accept unless clearly erroneous,[2] we conclude that the type of financial disclosure provided by the Ohio Education Association meets the requirements of *Hudson*.

Under *Hudson*, a union must adequately explain the basis for a fair share fee and that "adequate" financial

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[2]A finding is clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746 (1948). After reviewing the record in this case, we cannot conclude that the district court's findings with regard to the auditing Standard No. 29 Supplemental Schedule are clearly erroneous.

disclosure to nonunion members would include the major categories of expenses and verification by an independent auditor. 475 U.S. at 307 n. 18, 310, 106 S. Ct. at n. 18. The Ohio Education Association's financial disclosure is clearly adequate under *Hudson* because the Association disclosed its various types of chargeable and nonchargeable expenditures to the plaintiffs in a timely manner and because, as the district court specifically found, the Association's financial statements and its Supplemental Schedule were subjected to verification by an independent auditor.[3]

We reject the plaintiffs' contention that the Association's financial disclosure is inadequate under *Hudson* because the financial information disclosed was not audited at the "highest" level of audit service available or because the Association did not employ the "least restrictive" procedure imaginable to collect the fair share fees. The language in *Hudson* does not support this argument. *Hudson* stated that nonunion member employees must be given information "sufficient" to determine propriety of the union's fair share fee, but specifically noted that the union need not provide nonmember employees with an exhaustive and detailed list

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[3]On the question of "verification" by an auditor, we reject the plaintiffs' argument that the function of the independent auditor is to verify the union's calculation of the chargeable or nonchargeable nature of the major categories of union expenditures. Whether a union expenditure is "chargeable" or "nonchargeable" to nonmember employees is a *legal* determination that depends upon the type of union activity for which the expenditure is made. It is not the role of an auditor to make such a legal determination. Rather, an auditor's role is to verify the expenditures made by the union so as to ensure that the expenditures that the union claims it made for particular expenses were actually made for those expenses. *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987). Because the audit performed by an independent auditor in this case did so verify the expenditures of the Association, we hold that the audit met the constitutional standards of *Hudson*.

of all its expenditures and that "absolute precision" in the union's calculation of the fair share fees was not expected or required. 475 U.S. at 306, 307 n. 18, 106 S. Ct. at 1076, 1076 n. 18. Thus, *Hudson* does not mandate a union to utilize the *most* detailed and effective service available to audit the financial information disclosed to nonmember employees. Admittedly, an Auditing Standard No. 14 Special Report would, as the plaintiffs contend, give more detailed financial information to them than does the Auditing Standard No. 29 Supplemental Schedule currently provided by the Association. However, the mere fact that a Special Report would provide "better" or more detailed financial information does not make provision of a Special Report by the union constitutionally required. *Hudson* only requires that a union's procedures for collection of fair share fees provide "adequate" or "sufficient" financial disclosure so that nonmember employees such as the plaintiffs may "gauge the propriety of the union's fee." 475 U.S. at 306, 106 S. Ct. at 1076. We conclude that the Association's current financial disclosure is constitutionally sufficient under the standards established in *Hudson*.

We also reject the plaintiffs' assertion that this court's decisions in *Damiano* and *Tierney* require the Ohio Education Association to utilize the "highest" level of audit services in its financial disclosure to nonunion member employees. In *Damiano* and *Tierney*, we merely recited and then applied the standards in *Hudson* to the cases concerning procedures followed by unions for collecting fair share fees from nonmember employees.[4] In *Damiano*

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[4]We note that, although the unions' procedures were found constitutionally deficient in both *Tierney* and *Damiano*, the constitutional infirmities arose from aspects of the unions' procedures not at issue in this case. For example, in *Damiano*, the union had even failed to inform nonmember employees of the actual amount of the fair share fee or how the fee had been calculated. In *Tierney*, the union failed to provide audited financial information prior to the collection of the fair share fees. The financial [note cont'd on p. 9a]

and *Tierney* we did not extend the analysis of *Hudson* or set any additional or more stringent standards that a union must meet in disclosing financial information to nonmember employees. Thus, because the financial disclosures of the Association to the plaintiffs satisfy the constitutional requirements of *Hudson*, the disclosures are also constitutionally sufficient under *Damiano* and *Tierney*.

Finally, we note that our decision in this case is in accord with the recent holdings of other circuits on the issue of financial disclosures to nonunion member employees. In *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987), the Second Circuit explicitly rejected the proposition, advanced by the plaintiffs here, that *Hudson* required a union's fair share fee collection procedures to "constitute at least restrictive process imaginable." The Second Circuit in *Andrews* and the Seventh Circuit in *Ping v. National Education Association*, 870 F.2d 1369, 1374 (7th Cir. 1989), also agreed with our position, contrary to the contention of the plaintiffs in this case, that the role of the independent auditor under *Hudson* is to verify that a union such as the Ohio Education Association did in fact expend the amounts claimed for the various categories of activities, both chargeable and nonchargeable. The logic of the reasoning of these decisions supports affirmance of the district court's judgment that the Association's financial disclosure to the nonunion member plaintiffs is constitutionally adequate.

We agree with the conclusion of the district court that the type of financial disclosure provided to the plaintiffs by the Ohio Education Association under its fair share fee plan is constitutionally sufficient. We also agree that the

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disclosure procedures followed by the Association are clearly not deficient in such ways.

district court did not err in refusing to rule on the plaintiffs' motion for class certification, *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984), and, given our affirmance of the decision of the district court in favor of the Association, we decline to order the district court, as the plaintiffs seek, to now certify a class.

Accordingly, the judgment of the district court is affirmed.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

November 28, 1989

No. 88-4126

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

		FILE
DENNIS GWIRTZ, ET AL.,	)	NOV 28 1989
	)	LEONARD GREEN, Clerk
Plaintiffs-Appellants,	)	
	)	
v.	)	ORDER
	)	
OHIO EDUCATION ASSOCIATION,	)	
	)	
Defendant-Appellee	)	
	)	

BEFORE: KEITH and MARTIN, Circuit Judges; and GIBBONS*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

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* Hon Julia S. Gibbons sitting by designation from the Western District of Tennessee

APPENDIX C

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

November 18, 1988

Dennis GWIRTZ, et al., Plaintiffs,

v.

OHIO EDUCATION ASSOCIATION, Defendant.

No. C87-3476A.

United States District Court,
N.D. Ohio, E.D.

Nov. 18, 1988.

MEMORANDUM OPINION

DOWD, District Judge.

I. INTRODUCTION.

This is an action brought by the plaintiffs against the defendants for alleged violations of first amendment rights as a result of the defendant's collection of fair share fees under a public employment collective bargaining agreement. The parties agree that the dispute and issues presented in this case have been resolved by the Court's review of the Ohio Education Association's ("OEA") fair share fee plan in *Lowary v. Lexington Teachers Association*, 704 F.Supp. 1456 ("*Lowary* II"). *See* docket # 34. However, the one remaining issue not raised in *Lowary* but raised in this case is whether the type of financial disclosure provided by the defendant is sufficient under *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

The Court conducted a hearing on April 29, 1988 for the purpose of hearing testimony on the disclosure issue. The parties have since supplied the Court with post hearing memorandum and the Court is now in a position to rule on the remaining issue. For the reasons that appear below, the Court finds that the OEA's financial disclosure is adequate under the applicable case law.

II. BACKGROUND.

As a matter of introduction, the basic issue can be summarized as a dispute over whether one form of disclosure is required rather than another form.

The defendant OEA's financial disclosure is made up of its basic financial statements[1] along with a supplemental schedule setting out the chargeability versus nonchargeability expenses. The OEA's present financial disclosure (Plaintiff's Hearing Exhibit # 3) is referred to by the parties as a Supplemental Schedule presented with the basic statement ("Supplemental Schedule") which is regulated by statement on Auditing Standard No. 29 ("SAS 29"). The plaintiffs' position is that the defendant should be required to disclose its financial information with a "Special Report" or an "Examination on a Special Report" ("Special Report") which is governed by the statement on Auditing Standard No. 14 ("SAS 14").

It is basically undisputed that the level of assurance, and the level of detail is greater on an SAS 14 Special Report as opposed to a SAS 29 Supplemental Schedule. However, it is the defendant's position that the SAS 29

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[1]The basic financial statements include the balance sheet, statements of revenue and expenses, and statements of changes in financial position. Plaintiff's Exhibit 3; Tr. at p. 34-35.

Supplemental Schedule is sufficient and adequate disclosure under *Hudson* and subsequent case law.

The Court heard testimony from the plaintiffs' expert, Professor Hawkins, and the defendant's audit accounting firm representatives regarding the two types of reports. To better understand the testimony, it is important for the Court to define an often used term as it is used by the witness in the context of financial audits. The term "materiality" was defined by the plaintiffs' expert, Professor Hawkins, as "the magnitude that an omission or misstatement in the accounting presentation, that in the light of the circumstances, the judgment[ ] of a reasonable person relying on the accounting presentation would be changed or influenced." Tr. at 41-42. Robert Birzer of Deloitte, Haskins and Sells, a partner from the accounting firm that actually did the audit of the OEA's financial statements, explained what he referred to as "monetary precision" and "materiality" as

> [W]e set a basic monetary precision level to design, upon which we design the extent of our detailed testing. Materiality level is then evaluated upon [sic] conclusion of the audit based on known errors, as well as possible expected errors, and a conclusion is then reached based on those circumstances as to whether any adjustment has to be made to the financial statements.
>
> The monetary precision factors set a bench mark for which we decide that we want to insure a minimum level of testing based on this amount. Our integrated audit procedures result that we'll consider all items under that level, as well as items that are over that level.

Tr. at 114. While Mr. Birzer stated that "monetary precision" and "materiality" are not the same, the Court finds that Professor Hawkins definition is sufficient and not substantially different from Mr. Birzer.

Turning to the discussion of the testimony, Professor Hawkins' testimony can be summarized as follows: (1) the Supplemental Schedule, while an appropriate method of reporting, is reviewed with the same level of materiality as is the basic financial statements and is therefore insufficient for an appropriate review of the figures in the Supplemental Schedule (Tr. at 44); (2) the Special Report does not use the same level of materiality as the basic statement, but instead uses a more detailed and lower level of materiality, thus giving a more detailed picture of the subject matter of the Special Report (Tr. at 44); (3) that the Special Reports are often used when organizations want to report on the specific area of concern, *e.g.*, royalties under a music contract; and (4) the sophisticated user would be better serviced by an SAS 14 Special Report, rather than by an SAS 29 Supplemental Schedule.

Professor Hawkins' testimony highlighted the fact that the audit firm of Deloitte, Haskins and Sells used a materiality level of $820,000 on the OEA audit while many of the figures on the supplemental schedule were below that level. The implication, therefore, was that the auditors failed to audit the figures presented by the defendant in the supplemental schedule. Professor Hawkins testified that the materiality level used was simply too high for a detailed examination of the chargeability versus nonchargeability statement supplied in the SAS 29 Supplemental Schedule. Professor Hawkins also opined that the level or scope of audit under a SAS 29 Supplemental Schedule was less intensive than the scope of audit under a Special Report. Tr. at 54-61.

Robert Birzer of Deloitte, Haskins and Sells, a Big Eight accounting firm, performed the audit under consideration and was called on cross examination by plaintiffs at the hearing. Mr. Birzer testified that while the level of materiality was indeed $820,000, that the audit did not simply ignore figures below the level of materiality. Tr. p.

122; 159-61. Mr. Birzer also testified that the level of materiality is not disclosed to the client and is instead established by the auditor in order to maintain the integrity of the audit. Tr. at 157-58. Mr. Birzer testified that the use of a SAS 29 Supplemental Schedule is appropriate and often used for reporting special items such as material required by the Securities & Exchange Commission, the National Association of Securities Dealers, Regulations Broker Dealers, Federal Home Loan Bank Board, and the Department of Housing and Urban Development. Tr. at 150. Mr. Birzer also testified that the SAS 29 Supplemental Schedule is produced after the basic financial statements are subjected to a detailed audit examination. Accordingly, and in response to Professor Hawkins' claims, the SAS 29 Supplemental Schedule does in fact undergo an independent audit.

Based upon testimony at the hearing, the Court makes the following findings of fact: (1) in accordance with standard auditing procedures the basic financial statements are presented along with the SAS 29 Supplemental Schedule or SAS 14 Special Report; (2) the level of materiality used by auditors under a SAS 14 Special Report is generally lower than that used on an SAS 29 Supplemental Schedule; (3) the statements and auditing standards do not require either SAS 29 Supplemental Schedule or SAS 14 Special Report to be used as a matter of rule; (4) the SAS 29 Supplemental Schedule is a proper reporting mechanism for special subject matters such as the matter in this case as is the Special Report; and (5) under a Supplemental Schedule presented with the basic statement, the Supplemental Schedule is subjected to an independent audit because the basic financial statements from which

the Supplemental Schedule is derived, was subjected to detailed testing.[2]

III. DISCUSSION.

The crux of plaintiffs' argument is that the defendant is under an obligation to apply the least restrictive means available to it for collecting the fair share fees of the plaintiffs and as a part of that less restrictive means, the Union is under an obligation to effectively, fairly, and accurately explain the basis for the agency fee calculations. To that end, the plaintiffs argue that the SAS 14 Special Report, is the most effective means of explaining the agency fee calculations. In sum, the plaintiffs' argument is that the SAS 14 Special Report should be used as opposed to the SAS 29 Supplemental Schedule. The defendant, on the other hand, argues that the SAS 29 Supplemental Schedule is sufficient and adequate under *Hudson*.

The purpose of the financial disclosure in the fair share fee process, prior to the nonmembers' opportunity to object, is to provide the nonmember with sufficient information so that user can make an informed decision whether to object or not. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306, 106 S.Ct. 1066, 1075-76, 89 L.Ed.2d 232 (1986). Furthermore, this Court stated in *Lowary, II*, 704 F.Supp. 1456 that "[i]t is the

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[2]The plaintiffs argue that because eleven of the sixteen categories presented on the Supplemental Schedule were not subject to detailed testing, there was no independent verification by the auditor of the Supplemental Schedule. However, it was the testimony of the auditors that the schedule was derived from the detailed testing of the financial statements themselves and that there was indirectly an independent analysis of whether the expenditures were actually made. *See, e.g.* Tr. at 124. Moreover the auditors did supplemental checking on certain OEA accounts. Tr. at 125.

Union's position on what is chargeable that is important to a nonmember and not the position of an independent auditor. The nonmember, therefore, can make an informed decision as whether to object." *Id.* at 1462. The question, therefore, is whether the type of financial disclosure at issue provides the nonmember with "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1076.

In the Court's view, there are two extremes regarding whether there has been an adequate financial disclosure. On the one hand, as the Supreme Court stated, "[l]eaving the nonunion employees in the dark about the source of figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*." *Hudson*, 106 S.Ct. at 1076 (footnote omitted). On the other hand, "[t]he Union need not provide nonmembers with an exhaustive detailed list of all of its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* at n. 18.

In this case, the Court finds that the defendant's type of financial disclosure here, strikes a balance between the extremes and adequately discloses the financial position of the Union. The defendants' present financial disclosure, includes: (1) the audited basic financial statement of the union, including the supplemental schedule (approx. 14 pages); (2) the OEA's 1987-1988 budget (approx. 41 pages); the audited budget of the National Education Association (approx. 41 pages); the North Central Ohio Education Association expenditure report (1 page); and the Lexington Teachers Association (Richland) expenditure

report (1 page).[3] The users of the material in this case are education professionals with post-high school degrees and can fairly assess whether they want to object or not on the basis of the information disclosed to them. The user of this information is not, therefore, without sufficient basis to evaluate this material in terms of a decision whether to object to the fair share fee collection.

The plaintiffs would have the Court endorse a system that requires greater detail so that the user could be better informed. The plaintiffs argue that as it stands now the information provided can not be understood but by a very small percentage of the users. Tr. at 28-29. At the same time, the plaintiffs' expert admitted that the use of the SAS 14 Special Report would be of no more help in terms of increasing the number of those who understood the information. *Id.* However, the plaintiffs' witness opined that by providing a better or more detailed Special Report the user can be assured that the report is sufficient if the user fails to take heed of the report. *Id.* That rationale comes very close to the plaintiffs' early argument in *Lowary* that it is the role of the independent auditor to make an initial determination of chargeability versus nonchargeability, one which was not accepted by the Court in the latest *Lowary* decision. The auditor's role under *Hudson* and the subsequent cases is not to provide a level of reliance or assurance on the chargeability decision as the plaintiffs would wish, but rather the role is to verify the statements of the Union. Therefore, it is the user who must determine whether he or she wishes to object.

The plaintiffs argue that the Court is required to order the least restrictive means available for the Union to

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[3]See the affidavit of Jon A. Ziegler, General Counsel of the OEA, docket # 159 in *Lowary*, C86-1536A, and exhibits B, C, D and E, and plaintiff's hearing exhibit 3 in the above-captioned case.

disclose its finances and in this case the means is the SAS 14 Special Report. The Court disagrees and instead agrees with the Second Circuit in *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir.1987), where the Second Circuit stated that

> We do not believe that *Hudson* stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable. When the union's plan satisfies standards established by *Hudson*, the plaintiffs should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support.

Andrews, 829 F.2d at 340.

In this case, the Court finds that while the SAS 14 Special Report may be a more detailed auditing report it is any less restrictive than the SAS 29 Supplemental Schedule. The plaintiffs are merely attempting to narrow the focus and require the Court, and ultimately the judicial system, to mandate the specific conduct of the defendant. As an example, not only do the plaintiffs request that the Court order the use of a SAS 14 Special Report by the defendant, the plaintiffs also request that the Court order a litany of other requirements to be imposed upon the Union in its financial disclosure including: (1) that the Union use a very low level of materiality (the plaintiff, however, does not offer the Court a specific level to use); (2) that the Union perform "detailed audit testing on each major agency fee chargeability calculation;" (3) that the Union provide a detailed description of the programs and activities covered by each major expense category; (4) that the Union provide more detailed notes to its financial statements; (5) that the Union "provide a clear explanation as to what the auditor's opinion truly means and what the auditor's testing procedures actually entail;" (6) that the Union "provide a detailed description of the nature of

the internal records maintained by the Unions to prove the validity of the chargeability calculations;" and (7) that the Union provide a clear "indication as to which parts of the financial disclosure on the Union's communications, and which parts are the auditors." Plaintiffs' Post-Hearing Brief (docket # 49) at pp. 25-26. Moreover, the plaintiffs include that the Court should consider the appointment of an accounting expert as a Special Master for the purpose of temporarily overseeing the Union's engagement of their auditors. *See* footnote 9, p. 27 of docket # 49 Post Hearing Brief. The Court declines to take the intrusive action requested by the plaintiffs.

IV. CONCLUSION.

For the reasons that appear above, the Court finds that the type of financial disclosure provided by the defendant under its current fair share fee plan is adequate under *Hudson* and subsequent cases. Accordingly, the Court declines to provide the relief requested by the plaintiffs.

In view of the parties' representation that all the issues in this case are resolved by the Court in *Lowary* II (*see* C86-1536A, docket # 34) and the Court's decision on the accounting issue in this opinion, the Court finds that all issues in *Gwirtz v. Ohio Education Association* are hereby resolved. The Court, therefore, finds that judgment shall be entered in favor of the defendant and against the plaintiffs in the above-captioned case.

IT IS SO ORDERED.

APPENDIX D

SECTION 4117.09(C)
OF THE OHIO REVISED CODE

OHIO REVISED CODE § 4117.09(C)

(C) The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. The arrangement does not require any employee to become a member of the employee organization, nor shall fair share fees exceed dues paid by members of the employee organization who are in the same bargaining unit.

Any public employee organization representing public employees pursuant to Chapter 4117, of the Revised Code shall prescribe an internal procedure to determine a rebate, if any, for nonmembers which conforms to federal law, provided a nonmember makes a timely demand on the employee organization. Absent arbitrary and capricious action, such determination is conclusive on the parties except that a challenge to such determination may be filed with the state employment relations board within thirty days of the determination date specifying the arbitrary or capricious nature of the determination and the state employment relations board shall review the rebate determination and decide whether it was arbitrary or capricious. The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic and does not require the written authorization of the employee.

The internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germaine to the work of employee organizations in the realm of collective bargaining. . . .

APPENDIX E

AUDITORS' OPINION, OEA'S BASIC FINANCIAL STATEMENTS, AND SUPPLEMENTAL SCHEDULE OF AGENCY FEES

October 30, 1987

Deloitte
Haskins + Sells

155 East Broad Street
Columbus, Ohio 43215-3650
(614) 221-1000
ITT Telex: 4995627

AUDITORS' OPINION

Ohio Education Association:

We have examined the balance sheets of Ohio Education Association as of August 31, 1987 and 1986 and the related statements of revenue, expenses, and changes in cumulative excess of revenue over expenses and of changes in financial position for the years then ended. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying financial statements present fairly the financial position of Ohio Education Association at August 31, 1987 and 1986 and the results of its operations and the changes in its financial position for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

Our examinations were made for the purpose of forming an opinion on the basic financial statements taken as a whole. The supplemental schedule of agency fee chargeable, non-chargeable, and reasonably in dispute expenditures for the year ended August 31, 1987 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such supplemental

schedule has been subjected to the auditing procedures applied in the examination of the basic financial statements and, in our opinion, is fairly stated in all material respects when considered in relation to the basic financial statements taken as a whole.

Deloitte Haskins + Sells

October 30, 1987

(Except for the supplemental schedule of agency fee chargeable, non-chargeable, and reasonably in dispute expenditures, as to which the date is December 7, 1987.)

OHIO EDUCATION ASSOCIATION

BALANCE SHEETS, AUGUST 31, 1987 AND 1986

ASSETS

	NOTES	1987	1986
CASH (OVERDRAFT)		$1,268,755	$ (24,483)
RECEIVABLES:			
Membership dues		1,184,854	959,621
NEA Legal Services Plan		128,382	127,800
Other		229,451	293,749
Total receivables		1,542,687	1,381,170
Less allowance for doubtful accounts		145,000	125,000
Total receivables - net		1,397,687	1,256,170
INVESTMENTS:	1		
Money market funds		731,913	1,802,154
Fixed-income security mutual funds (at cost, which approximates market value)		643,930	220,489
Marketable debt securities (market value, 1987 - $582,187; 1986 - $745,000)		750,000	750,000
Marketable equity securities (at cost, which approximates market value)		215,272	348,819
Total investments		2,341,115	3,121,462
PROPERTY AND EQUIPMENT - At cost:			
Land and land improvements		601,090	601,090
Buildings and improvements		2,907,566	2,744,550
Equipment		2,683,924	2,490,776
Total		6,192,580	5,836,416
Less accumulated depreciation	1	2,795,536	2,549,484
Property and equipment - net		3,397,044	3,286,932
TOTAL		$8,404,601	$7,640,081

See notes to financial statements.

LITIES	NOTES	1987	1986
LITIES:			
nts Payable		$1,161,113	$ 939,743
Payable	2	20,200	375,074
and district asso-			
n dues payable . . .	1	972,123	826,958
ed expenses:			
ation and severance .	3	1,509,541	1,298,283
er		1,252,711	1,119,753
accrued expenses . .		2,762,252	2,418,036
liabilities		4,915,688	4,559,811
MITMENTS AND NTINGENCIES . . .	3, 5, 6		
ULATIVE EXCESS OF REVENUE ER EXPENSES . . .		3,488,913	3,080,270
L		$8,404,601	$7,640,081

OHIO EDUCATION ASSOCIATION

STATEMENTS OF REVENUE, EXPENSES, AND
CHANGES IN CUMULATIVE EXCESS OF REVENUE OVER EXPENSES
FOR THE YEARS ENDED AUGUST 31, 1987 AND 1986

	NOTE
REVENUE:	
Memberships - regular	
Local and NEA UniServ	
NEA subsidies - legal and membership	
Other	
Total revenue	
EXPENSES:	
General control:	
Special committees	
Executive committee	
Officers' expense	
Other	
Total general control	
General and administrative:	
Salaries and wages	
Pension plan and hospitalization	4
OEA-NEA Legal Services Plan	
Payroll taxes	
Building maintenance and rent	5
Travel	
Automobile leases	5
Publications	
Telephone and telegraph	
Depreciation	1
Office	
Governmental services	
Other	
Total general and administrative	
Total expenses	
EXCESS OF REVENUE OVER EXPENSES	1
CUMULATIVE EXCESS OF REVENUE OVER EXPENSES AT BEGINNING OF YEAR	
CUMULATIVE EXCESS OF REVENUE OVER EXPENSES AT END OF YEAR	

See notes to financial statements.

1987	1986
$15,138,631	$13,661,047
2,400,363	2,099,729
457,227	386,606
684,816	702,517
18,681,037	16,849,899
258,401	237,721
86,744	95,018
211,973	136,991
112,300	69,504
669,418	539,234
7,367,637	6,753,889
2,065,468	2,070,103
1,530,423	1,168,996
1,074,337	947,282
774,938	700,733
684,221	609,034
510,010	443,455
461,657	613,349
402,833	388,775
273,926	233,958
245,401	231,414
152,371	176,498
2,059,754	1,578,799
17,602,976	15,916,285
18,272,394	16,455,519
408,643	394,380
3,080,270	2,685,890
$ 3,488,913	$ 3,080,270

OHIO EDUCATION ASSOCIATION

STATEMENTS OF CHANGES IN FINANCIAL POSITION
FOR THE YEARS ENDED AUGUST 31, 1987 AND 1986

FUNDS PROVIDED:	
Operations:	
Excess of revenue over expenses	
Non-cash charge to income - depreciation	
Funds provided by operations	
Decrease (increase) in investments	
Increase in accrued expenses	
Increase in accounts payable	
Increase in NEA and district association dues payable	
Proceeds from the issuance of notes payable	
Total funds provided	
FUNDS APPLIED:	
Property additions	
Payments on notes payable	
Increase (decrease) in receivables	
Total funds applied	
INCREASE (DECREASE) IN CASH	

See notes to financial statements.

1987	1986
$ 408,643	$ 394,380
273,926	233,958
682,569	628,338
780,347	(1,196,607)
344,216	321,665
221,370	385,755
145,165	42,261
	318,960
2,173,667	500,372
384,038	834,831
354,874	95,514
141,517	(361,645)
880,429	568,700
$1,293,238	$ (68,328)

OHIO EDUCATION ASSOCIATION

NOTES TO FINANCIAL STATEMENTS

1. ACCOUNTING POLICIES

General - The Association was incorporated under the laws of the State of Ohio to further education and serve members in Ohio. Members in the Association are also members in the National Education Association (NEA) and the Association collects NEA dues from its members, which are remitted to the NEA. The Association also collects and remits certain district association dues for its members.

Investments - Investments are made with the objective of obtaining current income utilizing interest bearing obligations with maturities of not more than one year, investments in publicly traded common and preferred stocks, fixed-income security mutual funds, and publicly traded bonds in the top four investment rating categories. Common and preferred stock (marketable equity securities) and fixed-income security mutual funds are stated at the lower of cost or market value. Publicly traded bonds (marketable debt securities) are stated at cost, since the Association has the ability and intent to hold such securities to their maturities. The specific certificate method is used to determine the cost of securities sold.

Property and Equipment - Depreciation is computed on the straight-line method over the estimated useful lives of the assets ranging generally from seven to forty years.

Federal Income Tax - The Association is exempt from Federal income taxes under provisions of the Internal Revenue Code.

Membership Dues - Membership dues are recognized as revenue in the applicable membership period.

Reclassifications - Certain reclassifications have been made to the 1986 financial statements to conform to the 1987 presentation.

2. NOTES PAYABLE

Notes payable consist of the following:

	August 31.	
	1987	1986
Unsecured note payable to bank, interest at prime plus 1/2% (total of 8.75% at August 31, 1987), payable upon demand, currently being paid in monthly installments of $3,360 plus interest to February 1988	$20,200	$ 60,520
10-3/4% mortgage, collateralized by building located in Westerville, Ohio (loan was paid in full during fiscal 1987)	____	314,554
Total	$20,200	$375,074

3. SEVERANCE PAY

In accordance with the provisions of the collective bargaining agreement between the Association and

the Professional Staff Union, the Association is required, upon termination of employment, to grant severance pay to all covered professional staff employees (except in cases of discharge) based on the employees' continuous length of service with the Association up to a maximum of seven weeks' salary after 9 years of continuous service.

Accordingly, the Association accrues the estimated ultimate severance pay for each covered employee over the period from September 1, 1981 (the effective date of the collective bargaining agreement), or date of hire if later, to the employee's earliest retirement date (20 years of service or attained age of 60), in accordance with the Professional Staff Union bargaining agreement effective September 1, 1984. For fiscal 1987 and 1986, the provision for accrued severance pay was $64,693 and $77,556; and $304,465 and $239,772 is accrued at August 31, 1987 and 1986 in the accompanying balance sheets for such severance pay.

Total vested severance pay benefits due professional staff employees, based on salary rates and periods of continuous service at August 31, 1987, were approximately $552,000.

In accordance with the Professional Staff Union bargaining agreement effective September 1, 1984, and through August 31, 1987, the Association was required to accrue annually an early retirement benefit due staff employees who retire upon the earlier of the completion of 20 years of service or the attainment of age 60 after 5 years of service. The required annual accrual was $1,000 per staff employee for years of service subsequent to September 1, 1984 (through August 31, 1987) up to a maximum of $20,000 per employee. The Association records its

annual expense for such benefit based upon the present value of amounts expected to be paid utilizing a 10% discount factor (assumed long-term investment rate). The provision for fiscal 1987 and 1986 was $76,410 and $74,258; and $199,895 and $123,485 is accrued at August 31, 1987 and 1986, respectively, in the accompanying balance sheets for the early retirement benefit.

The Professional Staff Union's bargaining agreement effective September 1, 1987 eliminated the requirement to annually accrue such early retirement benefit after August 31, 1987, and provided employees with an option to either withdraw within 30 days (to September 30, 1987) the present value of their accumulated accrued early retirement benefit as of September 1, 1987 or to leave such amount intact to accumulate interest at 10% until their retirement. The Association paid $115,316 to employees electing the withdrawal option.

4. PENSION PLANS

The Association has two defined benefit pension plans covering substantially all of its professional and associate staff employees.

Pension costs are funded as accrued and total pension expense for 1987 and 1986 was $1,131,554 and $1,138,077.

At September 1, 1986 and 1985 (latest actuarial information available), the actuarially computed present value of plan benefits (assuming a 9% rate of return) and plan net assets, by plan, were as follows:

	.....September 1.....	
	1986	1985
PROFESSIONAL STAFF PLAN:		
Actuarial present value of accumulated plan benefits:		
Vested	$7,112,330	$6,238,723
Nonvested	272,697	297,638
Total	$7,385,027	$6,536,361
Plan net assets available for benefits	$6,913,650	$4,968,943
ASSOCIATE STAFF PLAN:		
Actuarial present value of accumulated plan benefits:		
Vested	$1,789,252	$1,645,283
Nonvested	77,685	85,375
Total	$1,866,937	$1,730,658
Plan net assets available for benefits	$2,931,840	$2,492,863

5. COMMITMENTS AND CONTINGENCIES

The Association leases automobiles under operating leases (principally three-year terms). The Association also leases office space under operating leases for varying terms ranging from one to five years.

The future minimum rental commitments due under these leases are approximately as follows:

	Automobiles	Office Space	Total
Fiscal year:			
1988 . . .	$447,000	$251,000	$ 698,000
1989 . . .	250,000	175,000	425,000
1990 . . .	68,000	131,000	199,000
1991 . . .	1,000	57,000	58,000
1992 . . .	———	30,000	30,000
Total	$766,000	$644,000	$1,410,000

Total office rental expense for 1987 and 1986 was approximately $324,000 and $288,000.

As part of its service to members, the Association serves as guarantor for personal bank loans obtained by members while participating in a strike. The amount of any individual member loan which the Association will guarantee is limited to the amount of wages lost by the member during a strike. The Association has obtained a $100,000 standby letter of credit which may be used only to repay any such member bank loans in the event of default by members. The amount of loans outstanding at August 31, 1987 which the Association has guaranteed is approximately $52,000.

6. LITIGATION

On August 4, 1987, the Association became a defendant in a lawsuit filed by a former employee alleging unlawful and discriminatory practices as a result of the Association's discharge of the employee in March 1987. The plaintiff is seeking $750,000 in compensatory damages and $1,000,000 in punitive damages. On October 9, 1987, the Association filed a response to

the plaintiff's claims denying the allegations of unlawful and discriminatory practices. The lawsuit is in the discovery stage. However, in the opinion of management, based in part on the statements of the Association's outside counsel concerning the litigation, resolution of the litigation will not have a material effect on the Association's financial statements.

The Association, in the course of its normal business, is a party to other lawsuits and claims generally related to education matters. Management is of the opinion that disposition of these matters will not have a material effect on the Association's financial statements.

OHIO EDUCATION ASSOCIATION

SUPPLEMENTAL SCHEDULE OF AGENCY FEE CHARGEABLE, N
AND REASONABLY IN DISPUTE EXPENDITURES FOR THE YEA

	CHARGEABLE
PROGRAM AREAS:	
Legal Services	$ 1,670,927
Membership	185,631
Professional development	546,740
Research	735,199
Organizing and bargaining	805,736
Uniserv	7,775,513
Governmental services	464,756
Communications	1,318,595
Total program areas	13,503,097
ADMINISTRATION AREAS:	
Governance	814,530
Administration	557,469
General counsel	137,528
Accounting	312,213
Custodial	605,208
Computer services	733,124
Printing and mailing	342,908
Division overhead	832,864
Total administration areas	4,335,844
TOTAL EXPENDITURES	$17,838,941

See notes to supplemental schedule.

N-CHARGEABLE,
ENDED AUGUST 31, 1987

NON-CHARGEABLE	REASONABLY IN DISPUTE	TOTAL EXPENDITURES
$ 457		$ 1,671,384
		185,631
		546,740
1,973		737,172
		805,736
21,002		7,796,515
257,253		722,009
40,222	___	1,358,817
320,907	___	13,824,004
4,969		819,499
955		558,424
1,010		138,538
9,050		321,263
		605,208
92,108		825,232
4,454		347,362
___	___	832,864
112,546	___	4,448,390
$433,453	$-0-	$18,272,394

OHIO EDUCATION ASSOCIATION

NOTES TO SUPPLEMENTAL SCHEDULE OF AGENCY FEE CHARGEABLE, NON-CHARGEABLE, AND REASONABLY IN DISPUTE EXPENDITURES

1. DESCRIPTION OF PROGRAM AREAS

The accompanying supplemental schedule presents expenses by program and administration areas or departments, for which such expenses include any amounts of overhead directly related to such areas or departments.

The Ohio Education Association's (OEA) expenditures for the year ending August 31, 1987 are accounted for in eight program areas and eight administrative areas. The program areas are:

Legal Services - administers the Unified Legal Services Program, the Liability Protection Program, the OEA Professional Liability Program and the Attorney Referral Program.

Membership - processes member and fee payor enrollments and maintain records of accounts receivable.

Professional Development - provides liaison for governance bodies, conducts training programs, and monitors activities of state and federal agencies.

Research - provides and analyzes statistical and financial data for collective bargaining and legislature lobbying and provides training programs.

Organizing and Bargaining - coordinates and administers a statewide organizing plan and plans,

directs, and evaluates the OEA's collective bargaining strategy.

UniServ - administers the UniServ Delivery Program to provide bargaining, contract administration, and grievance processing.

Governmental Services - provides legislature lobbying services and administers the OEA Educators Political Action Committee (OEA - EPAC).

Communications - provides internal and external communications services, including membership promotion services and local association communications assistance.

The Administrative areas are:

Governance - includes the four elected officers, the Executive Committee, the OEA Appeals Boards, and the Committees, Commissions, and Divisions.

Administration - includes the Executive Director and the Director of Human Resources.

General Counsel - provides legal services to the officers, staff, and members.

Accounting - carries out the financial operation of the Association.

Custodial - building maintenance, repairs, taxes, utilities, and insurance.

Computer Services - develops and maintains computerized information on OEA programs for use by other divisions and processes data for nonrelated companies.

Printing and Mailing - prints, duplicates, and copies materials, and distributes all mail.

Division Overhead - includes cost of obligations on programs not assignable to another specific division, such as building mortgage payments, bad debt expense on membership receivables, accrued severance and vacation pay, etc.

2. FAIR SHARE FEE CHARGEABLE AND NON-CHARGEABLE EXPENDITURES

The OEA collects agency or fair share fees from nonmembers of the OEA. These nonmembers are referred to as "fair share fee payors." The OEA is required by law to have procedures in effect to determine the amount of its expenditures which can be charged to objecting fair share fee payors. The procedures that the OEA applies have been adopted from the recommendations of an independent umpire who made the determination for OEA in prior years, established legal interpretations, and Section 4117.09 of the Ohio Revised Code.

In making its determination, OEA relies upon the following criteria to arrive at the specific amounts reflected in the schedules:

Chargeable Expenditures

Chargeable expenditures are expenditures for activities, training, communications, research, political, administrative or legislative efforts, legal services, etc., related to issues such as the following:

1) collective bargaining;
2) contract administration;

3) grievance adjustment;
4) specific terms and conditions of employment such as wages, hours, benefits, employment discrimination, pension reform/retirement, tenure, social security, employee evaluation, unemployment compensation, overtime and minimum wage provisions, environmental issues which affect working conditions in the schools, etc.;
5) federal/state/local funding for education;
6) tax initiatives and reform, to the extent they affect terms and conditions of employment, education funding, etc.;
7) organizing, recruiting new members, establishing new or expanded bargaining units, maintenance of existing membership and recognition rights, including defense against challenges from other unions;
8) professional development standards, including teacher education, certification, licensure, continuing education and teaching skills and techniques;
9) curriculum and other education issues;
10) OEA leadership and management skills and techniques;
11) insurance programs and other benefits for which members and fee payors are eligible; and
12) OEA, District and Local Representative Assemblies, Executive Committees, and Committees and Commissions;
13) public relations and media coverage to improve the public image of teachers and school employees;
14) social activities to promote union solidarity.

Non-chargeable Expenditures

Non-chargeable expenditures are those expenditures of an employee organization which are in support of partisan political or ideological causes not germane to the work of the employee organization in the realm of collective bargaining. For the purpose of the Fair

Share Fee Advance Reduction, non-chargeable expenditures also include member-only benefits which are not made available to fair share fee payors.

Non-chargeable expenditures include expenses for the following activities:

1) supporting or contributing to political organizations or candidates for public offices (e.g., activities in connection with the endorsement or other support of political candidates, activities in connection with OEA-EPAC, including its administration, consulting with/or providing training for state/local political action committees);

2) voter registration, get-out-the vote, campaign techniques (e.g., training programs designed to prepare leaders, staff and/or members to work in support of candidates for any public office);

3) supporting or contributing to ideological causes not germane to the work of the Local Association/OEA/NEA in the realm of collective bargaining, charitable causes, and religious causes (e.g., direct contributions to such causes, expenditures designed primarily to assist such causes, payments to fundraisers and/or conferences for groups which promote such causes);

4) monitoring, etc., of right-wing activities to the extent that they are unrelated to chargeable issues such as collective bargaining, education, working conditions, professional development, etc.; and

5) publications, portions of publications or any other communications which involve non-chargeable issues;

6) members-only benefits, such as interest-free loans and guaranteed health insurance benefits in crisis situations.

Using these criteria, each OEA program director and manager analyzes his/her staff's daily activity reports, vouchers and financial reports, etc. Based upon these analyses, the directors and managers determine which of their expenditures are chargeable and which are non-chargeable.

3. FAIR SHARE FEE EXPENDITURES REASONABLY IN DISPUTE.

The Association made no expenditures in the year ending August 31, 1987, which could be classified as being "reasonably in dispute," partially due to the fact that the classification of non-chargeable expenditures (described in Note 2 above) encompasses a broader range of expenditures than the law requires.

Supreme Court, U.S.
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No. 89-1331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DENNIS GWIRTZ, *et al.*,
Petitioners,
v.
OHIO EDUCATION ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred when it concluded, based on the factual findings of the District Court, that the notice sent to nonmember employees prior to the collection of fair share (*i.e.*, agency) fees—which included supplemental schedules of chargeable and nonchargeable expenditures for respondent Ohio Education Association and its affiliated parent organization, the National Education Association, that were independently audited by certified public accounting firms—satisfied the footnote reference in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), to "verification by an independent auditor."

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---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ohio Education Association submits that the Petition for a Writ of Certiorari should be denied, and files this brief in opposition to the Petition.

STATEMENT OF THE CASE

A. *The Background Facts.* Petitioners are teachers in one of two public school districts in Ohio. In both of these school districts, a local education association ("local association") that is affiliated with the Ohio Education Association ("OEA") at the state level and the National Education Association ("NEA") at the national level is recognized as the exclusive representative for a bargaining unit consisting of all teachers in the district. Although petitioners are members of those bargaining units, they chose not to join their respective local associations during the 1987-88 school year.

In their capacity as exclusive representatives, the local associations entered into collective bargaining agreements with their respective school districts that covered the 1987-88 school year. As permitted by Ohio law—specifically, Ohio Rev. Code § 4117.09(C), *reprinted in* Appendix to Petition ("App.") at 23a—each of those collective bargaining agreements contained a provision requiring employees within the bargaining unit who were not members of the exclusive representative to pay a fair share fee for services rendered by the exclusive representative and its affiliated organizations. Pursuant to these provisions, the local associations charged petitioners with a fair share fee for the 1987-88 school year.

To collect those fair share fees, both local associations followed a procedure that was adopted by OEA to govern fee collections from all nonmember employees in Ohio who were covered by a fair share fee agreement involving one of OEA's affiliated local associations. As the first step in that procedure, OEA mailed a notice to all nonmember employees on December 15, 1987. Because the Questions Presented by the Petition for a Writ of Certiorari concern the adequacy of the financial information that was provided in the December 15 notice, we describe in some detail the relevant documents that were included in that notice.[1]

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[1] Although not directly relevant to the issue in this case, it bears noting that the notice that OEA sent to nonmember employees included several documents other than the financial documents described in text. In particular, the notice contained a cover memorandum setting forth the amount of the fair share fee that the associations intended to charge to objecting nonmember employees, which was based on a determination that 97.6% of the OEA portion of the fair share fee and 78.9% of the NEA portion of the fair share fee would be expended on legally chargeable activities. *See* Plaintiffs' Exhibit 2 at 1-4. This cover memorandum also explained how OEA calculated its percentage of chargeable activities, including a lengthy list of the types of expenditures that OEA determined to be both chargeable and nonchargeable to objecting nonmember employees. In addition, attached to this cover memorandum was

With regard to OEA's portion of the fair share fee, the December 15 notice to nonmember employees included two documents describing the expenditures of OEA. The first document was OEA's Program Budget for 1987-88, which provided nonmember employees with a function-by-function breakdown of OEA activities and listed the expenditures associated with each of those activities. *See* Plaintiffs' Exhibit 2 at 14-55. The second document contained the audited financial statements of OEA, and consisted of two parts: (1) OEA's basic financial statements and accompanying notes for the fiscal year ending August 31, 1987, including a Balance Sheet setting forth Assets and Liabilities, a Statement of Revenue and Expenses, and a Statement of Changes in Financial Position, App. at 26a-35a; and (2) OEA's Supplemental Schedule of Agency Fee Chargeable, Non-Chargeable, and Reasonably in Dispute Expenditures for the Year Ended August 31, 1987, with accompanying notes, App. at 36a-42a. This Supplemental Schedule provided each nonmember employee with a breakdown of OEA's chargeable and nonchargeable expenditures by program and administrative area, App. at 36a, and the accompanying notes described each area and set forth the criteria that OEA used to allocate its expenditures among legally chargeable and legally nonchargeable expenditures, App. at 37a-42a.

Both OEA's basic financial statements and its Supplemental Schedule were subjected to independent audits by the certified public accounting firm of Deloitte Haskins

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a copy of OEA's Fair Share Fee Advance Reduction Procedure, which explained, among other things, exactly what a nonmember was required to do in order to file a timely objection to the amount of the fee. *See* Plaintiffs' Exhibit 2 at 5-7. This document specifically set forth the deadline for filing a timely objection, the place where the objection had to be filed, and the fact that the nonmember could simply state a general objection to the amount of the fee without specifying any reason for his or her objection and without identifying any particular expenditure to which he or she objected.

& Sells. Based on those audits, the accounting firm authored an auditor's opinion letter that also was distributed to nonmember employees as a cover sheet to these financial documents. App. at 24a-25a. That opinion letter read as follows (emphasis added):

> We have examined the balance sheets of Ohio Education Association as of August 31, 1987 and 1986 and the related statements of revenue, expenses, and changes in cumulative excess of revenue over expenses and of changes in financial position for the years then ended. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.
>
> In our opinion, the accompanying financial statements present fairly the financial position of Ohio Education Association at August 31, 1987 and 1986 and the results of its operations and the changes in its financial position for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.
>
> Our examinations were made for the purpose of forming an opinion on the basic financial statements taken as a whole. *The supplemental schedule of agency fee chargeable, non-chargeable, and reasonably in dispute expenditures for the year ended August 31, 1987 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such supplemental schedule has been subjected to the auditing procedures applied in the examination of the basic financial statements and, in our opinion, is fairly stated in all material respects when considered in relation to the basic financial statements taken as a whole.*

As the italicized portion of this opinion letter indicates, the Supplemental Schedule setting forth chargeable and nonchargeable expenditures was separately audited by the accountants at Deloitte Haskins & Sells, and in their

opinion, was "fairly stated in all material respects when considered in relation to the basic financial statements taken as a whole." [2]

The December 15 notice also included two documents that explained NEA's determination that 78.9% of its portion of the 1987-88 fair share fee was expended on activities that were legally chargeable to objecting nonmember employees. The first document—entitled "How NEA Calculates Its Agency Fee Chargeable/Nonchargeable Expenditures"—set forth the criteria that NEA used to determine chargeable and nonchargeable expenditures and provided each nonmember employee with a breakdown of chargeable and nonchargeable expenditures by program and administrative area. *See* Plaintiffs' Exhibit 2 at 70-82. The second document contained NEA's financial statements for the fiscal year ending August 31, 1987. Much like the financial statements regarding OEA, these materials included NEA's basic financial statements and a Supplemental Schedule of Agency Fee Chargeable and Nonchargeable Expenditures, all of which were audited by the certified public accounting firm of Coopers & Lybrand. *See* Plaintiffs' Exhibit 2 at 83-112. The results of these audits were set forth in two auditors' opinion letters that were included in the notice, one for NEA's basic financial statements and the other for NEA's Supplemental Schedule. *See* Plaintiffs' Exhibit 2 at 84, 99. Coopers & Lybrand issued the following opinion letter with regard to NEA's Supplemental Schedule (emphasis added):

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[2] It is undisputed that the language used in this opinion letter was precisely that required by the established auditing standards. *See, e.g.*, Transcript of Evidentiary Hearing ("Transcript") at 155-56 (April 29, 1988) (testimony of OEA auditor Robert Birzer that there is no flexibility in the language that an auditor may use in expressing an opinion on audited statements); *id.* at 177 (testimony of NEA auditor Arthur Mann to the same effect). Even the expert witness called by petitioners conceded that the language in this opinion letter was "exactly as required" by the auditing standards. *Id.* at 104 (testimony David Hawkins).

> Our examination was made for the purpose of forming an opinion on the basic financial statements taken as a whole. The accompanying Schedules of Agency Fee Chargeable and Nonchargeable Expenditures were presented for purposes of additional analysis and are not a required part of the basic financial statements. *Such information has been subjected to the auditing procedures applied in the examination of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.*[3]

In short, the notice that OEA mailed to all nonmember employees on December 15, 1987 included, *inter alia*, the basic financial statements and supplemental schedules of chargeable and nonchargeable expenditures for the 1987-88 school year for both OEA and NEA, each of which was audited by independent certified public accounting firms in accordance with generally accepted accounting principles.[4]

B. *The Decision of the District Court.* Petitioners filed this lawsuit in the United States District Court for the Northern District of Ohio on December 30, 1987. In their complaint, petitioners alleged, *inter alia*, that OEA had violated their constitutional rights by failing to disclose adequate financial information prior to collecting fair share fees. The District Court held a one-day evidentiary hearing on April 29, 1988, during which the court heard conflicting testimony from experts retained by petitioners and by OEA with regard to the sufficiency

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[3] Again, the language used in this opinion letter was precisely that required by the applicable auditing standards. *See supra* note 2.

[4] The notice sent to nonmember employees on December 15, 1987 also included statements of chargeable expenditures for the relevant local association and, if applicable, the district education association. *See* Plaintiffs' Exhibit 2 at 113-14. The adequacy of these statements is not an issue before this Court.

of the audited financial information that OEA had distributed as part of its December 15 notice. After receiving post-hearing briefs, the court issued a Memorandum Opinion, including specific findings of fact and conclusions of law, and entered judgment for OEA on November 18, 1988.[5]

The sole question before the District Court was whether "the type of financial disclosure provided by [OEA was] sufficient under *Chicago Teachers Union v. Hudson*," App. at 13a, and more specifically whether OEA satisfied the "auditing" requirement set forth in footnote 18 of that opinion, 475 U.S. 292, 307 n.18 (1986). The court began its analysis by noting that "OEA's present financial disclosure [is] a Supplemental Schedule presented with the basic statement." App. at 14a. Such a format, the court found, is "regulated by [S]tatement of Auditing Standard No. 29," App. at 14a, one of numerous standards governing auditors that are issued periodically by the Auditing Standards Board of the American Institute of Certified Public Accountants. *See* Plaintiffs' Exhibit 4 (copy of Statement of Auditing Standard ("SAS") No. 29). In accordance with the express terms of SAS No. 29, an auditor is authorized to report "to his client or to others [using] a document that contains information in addition to the client's basic financial statements and the auditor's standard report thereon." *Id.* at 1.[6]

---

[5] Although the December 15, 1987 notice included financial information about both OEA and NEA, and although evidence was presented at the April 29, 1988 hearing regarding the auditing procedures of both organizations, the decisions of the courts below dealt essentially with the adequacy of the OEA's audit of its own activities. In their Petition to this Court, petitioners likewise focus on OEA. It should be noted, however, that the auditing procedures of OEA and NEA are in all material respects identical, and that the conclusions reached by the courts below concerning the constitutional adequacy of those auditing procedures apply to both organizations.

[6] The information included in a Supplemental Schedule under SAS No. 29 may include "additional details or explanations of items

Based on the guidelines set forth in SAS No. 29, and the testimony at the evidentiary hearing, the District Court specifically found that "the SAS 29 Supplemental Schedule is a proper reporting mechanism for special subject matters such as the matter in this case." App. at 17a.[7] The court further found that "under a Supplemental Schedule presented with the basic statement, *the Supplemental Schedule is subjected to an independent audit.*" App. at 17a (emphasis added). In the case of OEA, this independent audit occurred in two distinct, albeit related, ways: first, the Supplemental Schedule was subjected to an independent audit "because the basic financial statements from which the Supplemental Schedule is derived, was subjected to detailed testing," App. at 17a & n.2 (the Supplemental Schedule "was derived from the detailed testing of the financial statements themselves"); and second, the Supplemental Schedule was subjected to an independent audit because "there was indirectly an independent analysis of whether the expenditures were actually made, [and] the auditors did supplemental checking on certain OEA accounts," App.

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in or related to the basic financial statements, consolidating information, historical summaries of items extracted from the basic financial statements, statistical data, and other material, some of which may be from sources outside the accounting system or outside the entity." Plaintiffs' Exhibit 4 at 2.

[7] In support of this finding, the court noted the testimony of OEA auditor Robert Birzer, who testified that "the use of a SAS 29 Supplemental Schedule is appropriate and often used for reporting special items such as material required by the Securities & Exchange Commission, the National Association of Securities Dealers, Regulations Broker Dealers, Federal Home Loan Bank Board, and the Department of Housing and Urban Development." App. at 17a (citing Transcript at 150). *See also* Transcript at 178-82 (testimony of NEA auditor Arthur Mann, describing use of Supplemental Schedules under SAS No. 29 for various business and governmental purposes, including reports for charitable organizations regulated by New York State and reports for retirement plans regulated by the Department of Labor).

at 17a n.2.[8] Based on these specific findings, the District Court concluded that "OEA's financial disclosure is adequate under the applicable case law." App. at 14a.

In reaching this conclusion, the District Court specifically rejected petitioners' claim that a Special Report

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[8] These findings of fact by the District Court were amply supported by the testimony presented by the OEA and NEA auditors during the evidentiary hearing. For example, when asked by the court how the auditors would discover an amount that was in the chargeable column that should be in the nonchargeable column, OEA auditor Robert Birzer testified as follows:

> WITNESS: We would [discover such an error] either through our detail testing, or we would make it through portions of our other audit procedures, which includes analytic review areas. For example, if we saw that the entire amount in governmental services for 1987 was in the chargeability caption, and no amount was nonchargeable, and in the prior years we had always discovered . . . significant amounts of nonchargeable expenditures, we would have investigated that and accounted for that on a satisfactory basis as to why there was no such amount in there this year.
>
> * * * *
>
> COURT: And how would your detailed testing have picked it up if, in fact, it did?
>
> WITNESS: We selected several accounts, several of the program areas, and looked at those reports that the client personnel prepared independent of the accounting department, and subjected them to several detailed tests.
>
> COURT: Such as?
>
> WITNESS: Such as looking at the time sheets for allocation of personnel looking at expenditures, invoices for monies spent, like spent to purchase T.V. time for a political candidate, or something in that particular area.

Transcript at 140-41. *See also, e.g., id.* at 125 ("We did additional testing back in the agency fee area as supplemental testing to primary testing that we had already done on the OEA accounts and records in performing our basic audit of the financial statements"); *id.* at 147 (primary testing of basic financial statement "wasn't primarily related to [the chargeability and nonchargeability calculations], but it included it, because . . . our audit planning memorandum . . . informed [our personnel] that this type of testing was being done in the course of the audit").

issued pursuant to Statement of Auditing Standard No. 14, as opposed to a Supplemental Schedule issued pursuant to SAS No. 29, is a constitutionally required part of OEA's financial disclosure. Although noting that "the level of assurance, and the level of detail is greater on an SAS 14 Special Report as opposed to a SAS 29 Supplemental Schedule," App. at 14a, and that "the level of materiality used by auditors under a SAS 14 Special Report is generally lower than that used on an SAS 29 Supplemental Schedule," App. at 17a, the court did not consider those differences determinative of the narrow issue presented in this case. Rather, the court found as fact, based on an admission by petitioners' own expert witness, that "the use of the SAS 14 Special Report would be of no more help in terms of increasing the number of those who understood the information," App. at 20a (citing Transcript at 28-29). This is because, regardless of whether OEA used a Special Report under SAS No. 14 or a Supplemental Schedule under SAS No. 29, the nature of the disclosure that was provided to nonmembers would "not . . . have been any different." Transcript at 156. *See id.* at 31-32 (petitioners' expert agreeing that there is "probably not a chance in the world" that the auditor's opinion would communicate a specific level of assurance to nonmember employees "[b]ecause this is a very technical language [and] you have to have a technician to understand it").

Accordingly, based on its express findings, the District Court concluded that "[OEA's] type of financial disclosure here . . . adequately discloses the financial position of the Union" and therefore "is adequate under *Hudson* and subsequent cases." App. at 19a, 22a. As the District Court put it, the overriding "purpose of the financial disclosure in the fair share fee process, prior to the nonmembers' opportunity to object, is to provide the nonmember with sufficient information so that [the] user can make an informed decision whether to object or not." App. at 18a (citing *Hudson*, 475 U.S. at 306). In

this case, the court reasoned, "[t]he users of the material . . . are education professionals with post-high school degrees and can fairly assess whether they want to object or not on the basis of the information disclosed to them." App. at 20a.

Finally, in an effort to place its holding with regard to the choice between a Supplemental Schedule under SAS No. 29 or a Special Report under SAS No. 14 in the proper context, the District Court addressed petitioners' underlying claim that OEA and its affiliates are required to adopt "the least restrictive means available for the Union to disclose its finances and in this case the means is the SAS 14 Special Report." App. at 20a-21a. The court rejected this argument. It agreed instead with the position taken by the United States Court of Appeals for the Second Circuit in *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987), quoting with approval the following paragraph from that decision:

> We do not believe that *Hudson* stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable. When the union's plan satisfies standards established by *Hudson*, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support.

App. at 21a. Indeed, the court noted, petitioners' attempt to compel OEA and its affiliates to use a Special Report under SAS No. 14 was just part of a larger "request that the Court order a litany of other requirements to be imposed upon the Union in its financial disclosure," including but not limited to "the appointment of an accounting expert as a Special Master for the purpose of temporarily overseeing the Union's engagement of their

auditors." App. at 21a-22a.[9] The District Court declined to take this or other "intrusive action" requested by petitioners. App. at 22a.

C. *The Decision of the Court of Appeals.* On appeal to the Sixth Circuit, petitioners again argued that this Court's decision in *Hudson* expressed a constitutional requirement that OEA provide its nonmember employees with a Special Report prepared pursuant to SAS No. 14 rather than a Supplemental Schedule under SAS No. 29. The Court of Appeals rejected this argument, and instead affirmed the District Court's conclusion that OEA's "disclosure of financial information to [petitioners] is constitutionally sufficient." App. 4a.

In particular, the Court of Appeals stated that, under this Court's decision in *Hudson*, "a union must adequately explain the basis for a fair share fee and that 'adequate' financial disclosure to nonunion members would include the major categories of expenses and verification by an independent auditor." App. at 6a-7a (citing 475 U.S. at 307 n.18) In this case, the court noted, OEA had "furnished [petitioners] with the budgets, audited financial statements and audited Supplemental Schedules of the Ohio Education Association and the National Education Association." App. at 6a. Moreover, the Court of Appeals noted, the District Court had "*specifically found* that: (1) the Auditing Standard No. 29 Supplemental Schedule was a proper reporting mechanism for special subject matters such as the matter in this case, and (2) the Auditing Standard No. 29 Supplemental Schedule was subjected to an independent audit." App. at 6a (emphasis added). Based on these findings by the District Court, which the Court of Appeals expressly upheld as not being "clearly erroneous," App. at 6a & n.2, the appellate court concluded "that the type

[9] The entire "litany" of requirements sought by the petitioners before the District Court is catalogued in that court's opinion. *See* App. at 21a-22a.

of financial disclosure provided by the Ohio Education Association meets the requirements of *Hudson*." App. at 6a. As the Court of Appeals expressly stated, App. at 7a:

> The Ohio Education Association's financial disclosure is clearly adequate under *Hudson* because the Association disclosed its various types of chargeable and nonchargeable expenditures to [petitioners] in a timely manner and because, as the district court specifically found, the Association's financial statements and its Supplemental Schedule were subjected to verification by an independent auditor.

The Court of Appeals also rejected petitioners' assertion that OEA's financial disclosure was inadequate because "the Association did not employ the 'least restrictive' procedure imaginable to collect the fair share fees." App. at 7a. Specifically, the court concluded that "*Hudson* does not support this argument," reasoning as follows:

> *Hudson* stated that nonunion member employees must be given information "sufficient" to determine the propriety of the union's fair share fee, but specifically noted that the union need not provide nonmember employees with an exhaustive and detailed list of all its expenditures and that "absolute precision" in the union's calculation of the fair share fees was not expected or required. 475 U.S. at 306, 307 n.18. . . . Thus, *Hudson* does not mandate a union to utilize the *most* detailed and effective service available to audit the financial information disclosed to nonmember employees. . . . [T]he mere fact that a Special Report [under SAS No. 14] would provide "better" or more detailed financial information does not make provision of a Special Report by the union constitutionally required. *Hudson* only requires that a union's procedures for collection of fair share fees provide "adequate" or "sufficient" financial disclosure so that nonmember employees such as [petitioners]

> may "gauge the propriety of the union's fee." 475 U.S. at 306.

App. at 7a-8a (emphasis in original).

Finally, the court rejected petitioners' assertion that affirmance of the District Court decision in this case would be inconsistent with the prior decisions of the Sixth Circuit in *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), and *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987). Those cases, the court noted, "did not extend the analysis of *Hudson* or set any additional or more stringent standards that a union must meet in disclosing financial information to nonmember employees." App. at 8a-9a. To the contrary, "because the financial disclosures [made by OEA] satisfy the constitutional requirements of *Hudson*, the disclosures are also constitutionally sufficient under *Damiano* and *Tierney*." App. at 9a. The court further noted that its decision in this case was "in accord with the recent holdings of other circuits on the issue of financial disclosures to nonunion member employees." App. at 9a (citing *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987), and *Ping v. National Education Association*, 870 F.2d 1369 (7th Cir. 1989)).

Petitioners' request for rehearing and suggestion for rehearing *en banc* were denied by the Court of Appeals.

REASONS FOR DENYING THE WRIT

The sole issue decided by the courts below was one unique to the evidentiary record in this case, *viz.*, whether the notice that OEA sent to nonmember employees on December 15, 1987, which included Supplemental Schedules of chargeable and nonchargeable expenditures for both OEA and NEA, each of which was independently audited by a well-respected certified public accounting firm pursuant to Statement of Auditing Standard No. 29, satisfied the footnote reference in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), to

"verification by an independent auditor." Before ruling on this issue, the District Court made specific findings of fact that were accepted as not clearly erroneous by the Court of Appeals. *See* App. 6a & n.2, 17a. Most notably, those findings were (1) that a Supplemental Schedule under SAS No. 29 is recognized by the accounting profession as a proper reporting mechanism for special subject matters such as the calculation of chargeable and nonchargeable expenditures at issue here, App. at 6a, 17a, and (2) that the Supplemental Schedules for OEA and NEA that were included in OEA's notice to nonmember employees in this case were "subjected to an independent audit," App. 6a, 17a. Based on these findings, the courts below concluded that the December 15 notice provided petitioners with adequate and sufficient financial information on which to decide whether to object to the amount of the fair share fee.

Although couching their argument in other terms, petitioners' submission to this Court represents nothing more than an attempt to reargue the factual questions decided below. Thus, petitioners devote almost five pages of their Petition to a "Summary of the Expert Testimony," Petition at 5-9, and provide this Court with a lengthy description of "what auditors are permitted to do, and actually do, under Generally Accepted Auditing Standards," Petition at 14-16. But petitioners either mischaracterize or completely ignore the determinative factual findings of the courts below. For example, petitioners state that "OEA's agency fee 'supplemental schedules' . . . were not subjected to a separate and specific audit," Petition at 7, even though the District Court expressly found as fact that the "Supplemental Schedule is subjected to an independent audit," App. at 17a, and even though the Court of Appeals expressly upheld that factual finding. App. at 6a. Similarly, petitioners contend that OEA's financial disclosure fell short because "the auditor must be engaged . . . specifically to audit the union's calculations . . . of what is chargeable and

what is not," Petition at 15, even though the courts below expressly found that the auditors in this case already have performed that task by verifying the OEA and NEA Supplemental Schedules that "se[t] forth th[ose] expenditures . . . that were chargeable to nonmember employees and those expenditures that were not chargeable to nonmembers," App. at 2a, 7a. The examples could continue, but there is no reason to belabor the point: although petitioners obviously disagree with the factual findings of the courts below, that disagreement does not warrant review by this Court.

We believe that the foregoing provides a dispositive response to the Petition. Nonetheless, in the interests of completeness, we will briefly address the two legal grounds which petitioners assert in support of their request for review.

I. First, petitioners argue that the Court of Appeals failed to apply the "traditional 'least restrictive means' test" when determining the adequacy of OEA's financial disclosure, and therefore erred by not requiring OEA to "engage its auditors to perform at the highest available level of audit service." Petition at 10-17. However, other than a string citation of cases that was included in the *Hudson* opinion simply to support the proposition that procedures affecting First Amendment rights generally must be "carefully tailored to minimize the infringement" of such rights, *see* 475 U.S. at 303 n.11, petitioners have pointed to nothing in this Court's decision in *Hudson*, or in any other decision, that requires OEA to meet such a standard.

In *Hudson*, this Court recognized that the collection of fair share fees has the potential for infringing on the First Amendment rights of nonmember employees, and therefore concluded that an exclusive representative must meet certain procedural requirements when collecting such fees, including the obligation to provide all nonmember employees with "*an adequate explanation* of the

basis for the fee." 475 U.S. at 310 (emphasis added). *See also id.* at 306 (nonmembers must "be given sufficient information to gauge the propriety of the union's fee"); *id.* (it is inadequate to "leav[e] the nonunion employees in the dark about the source of the figure for the agency fee").

The Court also offered some guidance in *Hudson* with regard to the specific information that unions must distribute to nonmember employees to meet this requirement. The Court first stated that a union must "identify[] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. In subsequent footnotes, the Court elaborated on this general standard, first characterizing the union's obligation to provide information to nonmember employees as a "limited notice requirement" that should not impose an 'undue burden" on the union, *id.* at 306 n.17, and then stating that a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," *id.* at 307 n.18. *See id.* (there necessarily exist "practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required' ") (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), and *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-40 n.40 (1977)). Finally, and of particular relevance here, the Court noted that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18.

While establishing a framework for protecting the constitutional rights of nonmember employees, the decision in *Hudson* does not indicate—and the rationale of the Court does not in any way suggest—that unions operating within this framework must utilize the best possible procedures available. The clear holding of the Court in

Hudson, repeatedly stated at numerous points in that decision, was only that unions must include in their notice "*an adequate explanation* of the basis for the fee" that would provide nonmember employees with "*sufficient* information to gauge the propriety of the union's fee." *See, e.g.*, 475 U.S. at 306, 307 n.18, 310 (emphasis added).

Indeed, the "least restrictive" standard proposed by petitioners in this case is incompatible with several specific holdings of this Court in *Hudson*. Thus, the decision in *Hudson* expressly allows unions to calculate the amount of their fair share fee with less than absolute precision, 475 U.S. at 307 n.18, to collect fees without a predeprivation hearing, *id.* at 309, 310, to provide expeditious arbitrations with less than full evidentiary safeguards, *id.* at 308 n.21, and to escrow less than 100% of the fee paid by nonmember employees while challenges to the fee are pending, *id.* at 310. In these and other areas, this Court plainly refused to impose on unions various procedures that would be "less restrictive" of First Amendment interests, and instead chose to consider the practical burdens that such procedures would impose.

The standard proposed by petitioners is, moreover, flatly inconsistent with the balancing approach that has been established by a long line of decisions of this Court in the context of fair share fees, including the Court's opinion in *Hudson* itself. In these decisions, the Court repeatedly has emphasized that unions also have a legitimate and important interest at stake: the right to eliminate free-riders by collecting and expending an objecting nonmember's fee for expenditures that are related to chargeable activities. In recognition of that interest, the Court has cautioned against overbroad remedies that "encroach[] on the legitimate activities or necessary functions of the union," *Machinists v. Street*, 367 U.S. 740, 774 (1961), and has approved only those remedies

protective of objectors' rights that are carefully tailored "lest the important functions of labor organizations . . . be unduly impaired," *Railway Clerks v. Allen*, 373 U.S. 113, 120 (1963). The Court in *Hudson* re-emphasized this need to accommodate competing interests when it stated:

> [T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*

475 U.S. at 302 (citations omitted) (emphasis added). By insisting that OEA must adopt the "least restrictive" means of collecting fair share fees, petitioners completely ignore this latter directive.

In short, the courts below correctly concluded that, to meet constitutional standards, the financial disclosure in this case did not have to incorporate the highest levels of audit service, but rather only had to satisfy the standard set forth in *Hudson*—*i.e.*, that a union must provide nonmembers with "an adequate explanation" of the fair share fee that includes "the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18, 310. The notice distributed by OEA on December 15, 1987—which for both OEA and NEA included Supplemental Schedules listing the major categories of expenditures that were verified by independent auditors in accordance with generally accepted accounting principles—easily met this standard.

II. Petitioners also contend that this Court should review the decision of the Court of Appeals because "the lower courts are chaotic in interpreting what this Court meant when it required a union's agency fee calculations to be 'verifi[ed] by an independent auditor.'" Petition at 17-21. Far from being in a state of chaos, however, the courts of appeals that have addressed the issue have unanimously endorsed the position taken by the court be-

low, and no federal or state court has taken a position to the contrary.

To begin with, as petitioners themselves concede, Petition at 13, 15, the decision below is fully consistent with decisions from the Second and Seventh Circuits, which are the only other federal appellate courts to have addressed the adequacy of audited financial information distributed by unions to their nonmember employees. Indeed, both *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987), and *Ping v. National Education Association*, 870 F.2d 1369 (7th Cir. 1989), were cited by the Court of Appeals in this case to demonstrate that its holding was "in accord with the recent holdings of other circuits." App. at 9a.

Petitioners assert that there is an internal conflict among decisions of the Sixth Circuit, Petition at 17-18, but that assertion is patently frivolous. Even assuming for the sake of argument that an *intra*-circuit conflict would provide a basis for this Court's review of the decision below, the Court of Appeals in this case expressly rejected petitioners' interpretation of its prior decisions in *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), and *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987). Instead, the court stated that *Damiano* and *Tierney* had "merely recited and then applied the standards in *Hudson*," App. at 8a, and "because the financial disclosures of [OEA] satisfy the constitutional requirements of *Hudson*, the disclosures are also constitutionally sufficient under *Damiano* and *Tierney*." App. at 9a.[10]

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[10] Indeed, petitioners' attempt to identify a "conflict" among decisions of the Sixth Circuit was the focus of their petition for rehearing and suggestion for rehearing *en banc* before the Court of Appeals. That petition was unanimously rejected on November 28, 1989. App. 11a-12a. *See also Lehnert v. Ferris Faculty Association-MEA-NEA*, 893 F.2d 111, 112 (6th Cir. 1989), *petition for cert. filed sum nom.*, 58 U.S.L.W. —— (U.S. March 8, 1990) (No. 89-1415) (subsequent decision of the Sixth Circuit expressly noting that "[u]pon suggestion that *Gwirtz* was inconsistent with *Tierney*

Finally, petitioners point to the recent decision in *Hohe v. Casey*, 727 F. Supp. 163 (M.D. Pa. 1989), as creating a conflict among the lower federal courts. Although the District Court in *Hohe* concluded that the unions involved in that case had not provided nonmember employees with adequate financial information, the court's holding was expressly limited to accounting reports prepared pursuant to SAS No. 35, which is a completely different auditing standard than SAS No. 29 that governed the Supplemental Schedules involved in the instant case. *See* Petition at 19 (acknowledgment by petitioners that "the accounting disclosed in this case used a different format than that in *Hohe*"). Indeed, the court in *Hohe* specifically distinguished the information provided to nonmember employees in that case from the unique facts of this case, stating the point as follows: "Defendants' reliance upon [*Gwirtz*] is misplaced. In *Gwirtz*, the union had audited the breakdown of chargeable and non-chargeable expenses under SAS No. 29 standards. The breakdown [here] was pursuant to SAS No. 35 standards." 727 F. Supp. at 166. Thus, even the District Court in *Hohe* recognized that its decision was not in conflict with the decision of the Court of Appeals in this case.

In short, petitioners have not identified any conflict among lower court decisions that might warrant this Court's review.

. . ., the court considered a petition for rehearing en banc and declined to rehear *Gwirtz*").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ARGUMENT

POINT 1: Respondent Ohio Education Association ("OEA" or "union") asserts that this Petition is an attempt to relitigate "factual" determinations. Respondent's Brief in Opposition at 14-16. However, that assertion is merely part of a transparent effort to avoid this Court's review of an important constitutional issue through legerdemain.

The district court recognized that no salient facts were in dispute in this case:

> It is basically undisputed that the level of assurance, and the level of detail is greater on an SAS 14 Special Report [the type sought by the nonunion teachers] as opposed to a SAS 29 Supplemental Schedule [the type disseminated by the OEA]. However, it is the [OEA's] position that the SAS 29 Supplemental Schedule is sufficient and adequate disclosure under *Hudson* and subsequent case law.

Appendix at 14a-15a.

The only truly disputed issue is the *legal* question of whether the union's use of the low-level SAS 29 Supplemental Schedule form of financial reporting properly protected the nonunion teachers' First Amendment right to refrain from "being compelled to subsidize the propagation of political or ideological views that they oppose." *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986). The court of appeals also recognized that only a legal issue, not facts, was in dispute when it stated:

> Admittedly, an Auditing Standard No. 14 Special Report would, as the [teachers] contend, give more detailed financial information to them than does the Auditing Standard No. 29 Supplemental Schedule currently provided by the [union]. However, the mere fact that a Special Report would provide "better" or more detailed financial information does not make provision of a Special Report by the union constitutionally required.

Gwirtz v. OEA, 887 F.2d 678, 682 (6th Cir. 1989) (Appendix at 8a).

The testimony in the district court was hardly "conflicting" on the critical facts, as Respondent's Brief at 6 misleadingly characterizes it. The union's auditor

admitted that had he been authorized by it to perform a higher-level audit engagement, he would have been required to perform more detailed audit testing specifically on the chargeability vs. nonchargeability breakdown for each of the union's sixteen major categories of expenditures. *See* Robert Birzer at Transcript ("TR") 116 & 168 (admitting that a higher-level engagement "could have resulted in an additional lot of testing," and thus a "higher level of assurance" to the agency fee payors).

In short, no disputed factual issues are presented to this Court for review. It is undisputed that the union had open to it readily available and higher-level auditing options, but wilfully chose to give the nonunion teachers only low-level financial reports which provided little independent assurance that the agency fee calculation was in any way accurate. The dispute is exclusively over the legal issue of whether the First Amendment, as interpreted in *Hudson* and *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), requires use of the better financial disclosure that the union could have readily chosen.

It is respectfully submitted that this case, with its detailed record of expert accounting testimony, provides a perfect opportunity for this Court to decide this timely and important constitutional issue.[1]

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[1]Respondent's Brief at 15 criticizes the teachers for including highlights of the expert testimony in their Petition. The expert testimony was summarized solely to help this Court understand the *true* nature of the low-level agency fee engagement unilaterally structured by the union. The district court recognized that the expert testimony was an "educational process" for the courts, and was "helpful to the Court in a broad grasp." (TR at 32-33). Obviously, the union's interests are served if this Court is denied an explication of the crucial differences between the low-level engagement structured by the union, and the higher-level engagement sought by the nonunion teachers. **[note cont'd on p. 4]**

POINT 2: The agency fee "supplemental schedule" reports issued by the union were *not* subjected to a separate and specific audit of the agency fee *chargeability vs. nonchargeability calculations*. By inferring otherwise, Respondent's Brief at 4 & 14, the union again resorts to sleight of hand in attempting to avoid this Court's review.

A careful reading of the auditor's "opinion letters" (Appendix at 24a-25a) shows that the agency fee supplemental schedule reports were audited *only* "in relation to the basic financial statements taken as a whole." The agency fee assertions were *not* subjected to a separate and independent audit standing alone. (Robert Birzer at TR 115-18). The union's auditor admitted that agency fee information is *not* a part of any entity's "basic financial statements," and thus those basic statements are essentially irrelevant to the breakdown of expenses into chargeable vs. nonchargeable categories. (Robert Birzer at TR 167-69). To put this in a practical context, we posit the following analogy: If a customer of a store wanted to have *his* bill verified, he would take small comfort from knowing that his bill had been audited, but *only* in the sense that the store's receipts from all customers across the country were audited in common.

Here, the teachers seek verification specifically on the union's *chargeability vs. nonchargeability calculations*, in order to ensure that they receive an "appropriately justified advance reduction" which minimizes "both the impingement" of the agency shop on their First

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It also should be noted that Respondent's Brief contains at least five pages of detailed discussion of the record and expert testimony, thus committing the same "sin" for which the teachers were accused. Respondent's Brief at 7-11.

Amendment rights and "the burden" of objection. *Hudson*, 475 U.S. at 309. No amount of obfuscation by the OEA can blur the fact that no audits were performed specifically on the agency fee issues standing alone. In fact, the union concedes, as it must, that it could have engaged the auditors to specifically audit the agency fee calculations standing alone, and that this would have provided a higher level of precollection assurance to the teachers that the calculations and seizures from their wages did not include charges for political and ideological activities they abhor. Respondent's Brief at 10 (describing the findings of the district court).

POINT 3: Respondent's Brief at 16-19 asserts that the traditional "least restrictive means" test does not apply to this First Amendment case, although its discussion of this issue is striking for what it omits. The union fails to discuss *Ellis*, 466 U.S. at 443-44, where the Court implicitly applied the least restrictive means test to require unions to utilize "advance reduction" and "interest-bearing escrow accounts" to ensure that nonmembers' money is not committed to improper uses even temporarily. Where there are "readily available alternatives . . . that place only the slightest additional burden, if any, on the union," the Court held, those alternatives must be utilized. *See also Hudson*, 475 U.S. at 303 & nn.11-12 (explicitly applying strict scrutiny).

To support its assertion that the nonunion teachers are entitled only to watered-down protections of their First Amendment rights, the OEA takes out of context this Court's statements that there must be "an *adequate* explanation of the basis for the fee" and that "absolute precision in the calculation of the charge to nonmembers cannot be expected or required." *Id.* at 307 n.18, 310, quoted in Respondent's Brief at 16-17 (emphasis added).

The OEA ignores this Court's holding that the requisite notice and financial disclosure must be "sufficient *to satisfy the First Amendment concerns* in this context." *Id.* at 306 n.17 (emphasis added). Also, the fact that "absolute precision" is not required does not mean that the union has *carte blanche* to calculate the fee with little or no precision. As one lower court held, only "a limited amount of imprecision is tolerable in calculating a service fee." *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1482, 1484 (W.D. Mich. 1988); *see Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987).

In short, the lower courts' refusal to apply the least restrictive means test to protect the teachers' First Amendment rights cannot be reconciled with this Court's precedents.

POINT 4: The union's argument also fails to recognize that the audit required by *Hudson* serves a purpose other than to give the nonmember sufficient information to decide whether or not to object to the amount of the service fee. *See* Respondent's Brief at 16-18. An equally important purpose is "to provide adequate *justification* for the advance reduction of dues," *Hudson*, 475 U.S. at 309 (emphasis added), to reduce the risk that the fee collected from objecting nonmembers will include costs that are not constitutionally chargeable to them.

"[I]n this context, the procedures required by the First Amendment *also provide the protections necessary for any deprivation of property*." *Id.* at 304 n.13 (emphasis added). As Respondent's Brief at 18 points out, *Hudson* allows unions "to collect fees without a predeprivation hearing." That does not mean that *Hudson* allows unions to collect fees without *any* "reliable 'initial check against mistaken decisions.' " *Brock v. Roadway Express, Inc.*, 481 U.S. 252,

263 (1987) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985)). No such reliable predeprivation check—"adequate justification for the advance reduction of dues," *Hudson*, 475 U.S. at 309—is provided by the self-interested union officials who calculate the fee. *See id.* at 308. Thus, it must be provided by the "verification by the independent auditor," *id.* at 307 n.18; *see Tierney v. City of Toledo*, 824 F.2d 1497, 1502-03 (6th Cir. 1987); *Damiano*, 830 F.2d at 1369-70.

POINT 5: The OEA attempts to obscure the lower courts' confusion and conflict as to the meaning of *Hudson*'s requirement of "verification by an independent auditor." As discussed in the Petition, *Hohe v. Casey*, 727 F. Supp. 163, 166 (M.D. Pa. 1989), recognized the conflict between the Sixth Circuit's decision in *Tierney* and the Second Circuit's in *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (1987) on this issue. More recently, in *Antry v. Illinois Educational Labor Relations Board*, No. 4-88-0314, ___ Ill. App. 3d ___ (Mar. 15, 1990), the Illinois Court of Appeals also recognized the same conflict. In short, the fact that the union and the panel below refuse to acknowledge that conflict does not negate its existence.

Furthermore, notwithstanding the court's attempt in *Hohe*, 727 F. Supp. at 166, to distinguish that case from this one, it is clear that the low-level reports disseminated to agency fee payors in this case would not comply with the strict requirements enunciated in *Hohe*. *See* Petition at 19-20.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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